Supreme Court, U.S.
FILED
DEC 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-807

ROBERT C. AGRON,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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December 17, 1971.

THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO

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ILLINOIS BELL TELEPHONE COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner Robert C. Agron prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 22, 1971.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. 1a) is not yet reported. The opinions of the District Court (App. 18a and 23a) are reported at 319 F. Supp. 418 and 325 F. Supp. 487 (N. D. Ill., 1970).

JURISDICTION.

The Court of Appeals entered judgment on September 22, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Are state and local taxes charged to telephone subscribers and separately stated on telephone bills includable in the federal telephone tax as "amounts paid for . . . communication services" (26 U. S. C. § 4251)?

2. If refunds are due, they are owed to 3,000,000 subscribers, the bulk of whose claims are too small to warrant individual action, but together total more than $10,000,000. Does a federal court have jurisdiction to entertain a class refund suit on their behalf or is such suit barred by sovereign immunity?

STATUTORY PROVISIONS INVOLVED.

The applicable statutory material is set forth at App. 27a.

STATEMENT OF THE CASE.

After his individual and class refund claims were denied by the Internal Revenue Service ("IRS"), petitioner brought this statutory action under 28 USC § 1346(a)(1) individually (Count I) and on behalf of three million subscribers of Illinois Bell Telephone Company ("IBT") who are situated similarly to him (Count II) to recover from the United States refunds exceeding $10,000,000 for communication services taxes collected illegally since Oc-

tober, 1965. The federal communication services tax, Internal Revenue Code ("IRC"), 26 USC §§ 4251-4254, currently authorizes a 10% telephone tax on "amounts paid for * * * communication services * * *." IRC § 4251(a). For some years the State of Illinois and various municipalities have collected taxes based on telephone service charges or "gross receipts". (Ill. Rev. Stat. (1969) Ch. 120, § 467.1; Ch. 24, § 8-11-2). IBT pays these taxes but is authorized to and does collect from subscribers the amount of such taxes together with the cost of collection (Ill. Rev. Stat. (1969) Ch. 111⅔, §§ 36(a)(b)). These taxes are stated separately on telephone bills in a column designated "Due to State and Local Taxes". The Government and IBT have been collecting the federal telephone tax not only on telephone services but also upon these state and local taxes.

On cross-motions for summary judgment, the district court held that the state and local taxes were not amounts paid for communication services and that it was illegal to collect the federal tax on top of the state and local taxes. 319 F. Supp. 418; App. 18a. While granting petitioner judgment for the amount of his individual claim, $23.98, the court held that there was no federal jurisdiction over a class action to recover tax refunds on the theory that sovereign immunity required a refund claim for each of the 3,000,000 subscribers. 325 F. Supp. 487; App. 23a.*

* The district court also held that in an action against the United States, IBT could not be joined as a defendant in Counts II and III and that Count III, which stated a derivative claim on behalf of IBT for its subscribers under IRC § 6415(a), could not be maintained. App. 23a. Petitioner does not argue these issues here, but reserves them should the Court issue a writ of certiorari not otherwise limited. We merely note the underlying facts as to why IBT's joinder was necessary and proper under Federal Rule 19. As of about 1969 the total refund due exceeded $10,000,000. The amount being overcollected from IBT subscribers as a class currently exceeds $3,000,000 a year. The Government has no records to determine the amount of refunds due to the subscribers as a class or individually. The total refund due to the class as a whole may be determined from IBT records. IBT

The Court of Appeals reversed (App. 1a). Although it held unsound the Government's principal argument that the separately stated state and local taxes are "amounts paid for communication services" because they are included in the "sum of all charges" in the telephone bills (App. 14a, n. 14), the court gave effect to that very contention by concluding that they are "part of the price IBT demands for its services" (App. 12a, 15a). Because of its disposition of the merits, the court did not reach the procedural-jurisdictional issues concerning the class and derivative actions and joinder of parties.

REASONS FOR GRANTING THE WRIT.

1. *The Court of Appeals erroneously held that state and local taxes on telephone charges, even where separately billed as taxes, are "amounts paid for communication services."*

The decision below places in jeopardy an important principle of federal tax law administration affecting all taxes passed on to consumers and conflicts with decisions of this Court, other Courts of Appeals, including the Seventh Circuit, and the Court of Claims, and is contrary to Congressional intent.

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records also show the amount overpaid by individual subscribers at least for a significant period. The refund due each subscriber may also be computed from telephone bills rendered to subscribers by IBT, but few subscribers will have retained their complete bills for the period in question and cannot know how much to claim. Administratively a refund will be most feasible if carried out through IBT which is the collecting agency for the United States. IBT may be the proper party to receive the refund from the United States on behalf of its subscribers. Counts II and III pray for judgment against the United States for a refund for the total amount overcollected from all subscribers from October, 1965, to date and for an accounting by IBT to determine the amount of the refund. See Rappaport Affidavit, Jt. App. 81-4.

The Court of Appeals stated that the Government was wrong in its principal argument that the state and local taxes are amounts paid for communication services because they are computed in the "sum of all charges" included in the telephone bill. App. 14a, n. 14. Yet the court gave effect to this very contention. This fundamental inconsistency is inexplicable but the court's reliance upon *Lash's Products* v. *United States*, 278 U. S. 175 (1929) is clear error: (1) in conflict with *Lash's Products* it failed to give effect to the established rule that the price paid for goods does not include taxes that are separately stated; and (2) it misapplied *Lash's Products* and confused the issue of what is the "price paid" with what are the "goods" or "services" subject to tax, an issue not before the Court in *Lash's Products*.

A. The Court below misconstrued and misapplied *Lash's Products*. In that case a federal tax was imposed on manufacturers to the extent of 10% of the price for which soft drinks were sold. No state or local taxes were involved. This Court held that for purposes of computing the tax, the price included the federal tax unless it was separately stated. That case concerned what was the price paid for goods which were concededly soft drinks subject to tax. The court below failed to discern that the issue here is not merely the method of computing the price paid for communication services but whether the items in question —state and local taxes—are in fact and law charges for "communication services." Only by first determining that they are could the court reach the question whether they are includable as amounts paid for communication services if stated separately. But the court below never really considered whether state and local taxes were charges for communication services. Instead, it merely concluded, based on *Lash's Products*, that since IBT charged subscribers for such taxes, they must be amounts paid for

communication services because they are "a part of the price IBT demands for its services." (App. 15a.) The court thus followed the Government's "sum of all charges" argument, which is based on IRC §4254, while stating that it recognized this contention was fallacious (App. 14a, note 14). The court below confused the issue of what is the price paid for "communication services" with the issue of whether state and local taxes are "communication services" subject to the federal tax.

The decision is not only inherently inconsistent but squarely at odds with the communication services tax statute, regulations and rulings which make clear that the tax applies only to charges for telephone services and that whether an item included in the bill is subject to federal tax must be independently examined to ascertain whether it is for "communication services." The court's conclusion that Congress intended that "the amount charged by a telephone company should not be broken down into its component parts for purposes of computing the tax" (App. 14a, n. 14), is plainly erroneous. The whole thrust of the statute and the Government's own regulations and rulings is to the contrary. The bill must be and is broken down to determine whether the item charged by IBT is in fact for communication services. Thus, charges included in the bill for "yellow page" directories are not subject to tax because they are really for advertising. Rev. Ruling 58-299, 1958-1 C. B. 436 and Cf. Rev. Ruling 68-92, 1968-1 C. B. 488. In a whole variety of rulings under this tax the IRS has considered the nature of the services for which charges are made to determine whether such charges are for communication services or for something else. These rulings reveal that the amounts paid must be for some kind of *telephonic* service, equipment or facilities.[1] These rulings

1. See, e.g., Rev. Ruling 56-248, 1956-1 C. B. 518; Rev. Ruling 56-390, 1956-2 C. B. 837; Rev. Ruling 68-93, 1968-1 C. B. 488; and Rev. Ruling 56-391, 1956-2 C. B. 837-8.

Items included in the bill must also be excluded when expressly exempted by the statute. IRC § 4253(g).

are consistent with the statute itself which limits communication services to amounts paid for "telephone service" (IRC § 4251(a)). See also IRC §§ 4252(a)(b) and 4254 (a)(1).

The regulations confirm what is clear on the face of the statute as to the meaning of "amounts paid for communication services." Thus Regulations § 49.4251-1 (26 C. F. R. § 49.4251-1; C. B. 1963-2, 550) provides in part:

> "(a) In general. Section 4251 imposes a tax on *amounts paid for general telephone service;* toll telephone service; telegraph service; teletypewriter exchange service; wire mileage service; and wire and equipment service. * * * (emphasis is supplied throughout this Petition unless otherwise stated).

See also §§ 49.4251-2(b), 49.4252-1(a)(b), 49.4252-2(a)(b); 49.4252-4(a) and 49.4254-1(a).

From the face of the statute, the regulations and rulings, it plainly appears that the amount paid for communication services embraces only charges made by IBT for its *telephone services* and does not embrace state or local taxes measured by the charge for the communication services, as the district court correctly held (319 F. Supp. at 421; App. 22a).

Even if the statute, regulations and rulings did not clearly exclude the local taxes as charges for communication services, it certainly cannot be said that they are clearly includable. For this reason, too, the court below has run afoul of decisions of this Court expressing the universal and fundamental principle that in the interpretation of tax statutes any ambiguity must be construed strictly against the government. *Gould* v. *Gould,* 245 U. S. 151, 153 (1917) ("In case of doubt [tax statutes] are construed most strongly against the government, and in favor of the citizen.").

B. The federal tax consequences of separately stating federal, state or local taxes has had application in a variety of important tax contexts over the years and, as this case illustrates, down to the present time. It has long been engrained in federal tax statutes and regulations. In *Lash's Products,* this Court held, in accordance with the Revenue Service's own regulations, that where the price of goods sold included the federal tax in a composite or single price and did not state separately the amount of the federal tax on "soft drinks", the price of the goods sold upon which the federal tax was based included the federal tax itself. When the "soft drinks" tax was held inapplicable to sweet cider, the purchaser, under contracts which had separately stated the federal tax, was permitted to recover the taxes he paid to his vendor. Judge Cardozo, then speaking for the New York Court of Appeals, stated: "This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. . . . This is a case where the promise of the buyer is to pay a stated price, and to put the seller in funds for the payment of a tax besides. . . . ." *Wayne County Produce Co.* v. *Duffy-Mott Co.*, 244 N. Y. 351, 155 N. E. 669 (1927).

Following these decisions, the Courts of Appeals and the Court of Claims have consistently held that the distinction in stating or not stating separately taxes, as well as other items, is one with a considerable difference to federal taxpayers. See, e.g., cases concerning refunds of processing taxes declared invalid: *Golding Bros. Co. v. Dumaine,* 93 F. 2d 162, 164 (C. A. 1, 1937); *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 F. 2d 366 (C. A. 10, 1939); and *Ismert-Hincke Milling Company* v. *United States,* 90 Ct. Cl. 27 (1940). Indeed, a leading case concerning such refunds and giving effect to the failure to set forth taxes as a separate item was a Seventh Circuit decision, *Continental Baking Co.* v. *Suckow Milling Co.*, 101 F. 2d 337 at 338 (CA 7,

1939). See also *Consolidated Flour Mills* v. *PH Orth Co.*, 114 F. 2d 898, 903 (C. A. 7, 1940).[2] Similarly, the Court of Claims has held that the federal excise tax on automobiles did not apply to actual freight charges when stated separately, *Star Motor Co.* v. *United States*, 41 F. 2d 901 (Ct. Cl. 1930).

In relying on the oft-quoted statement in *Lash's Products* that the "price is the total sum paid for the goods", the court below (App. 11a-12a, 14a 15a) patently failed to take into account the distinction recognized in *Lash's Products*, and followed in the other cases cited above, that the price paid for goods does not include taxes which are stated separately. Instead, the court below held that since it found that under state law the state and local taxes were imposed on IBT, not the subscribers, it was immaterial that the taxes were stated separately because they were part of IBT's price. The court said (App. 12a):

> "That the cost of taxes *imposed* on manufacturers and retailers is added into the price at which goods are sold, even if such taxes are itemized and specifically identified, simply increases the price the consumer must pay to receive the goods or services."

Assuming, *arguendo*, that the state and local taxes are imposed on IBT and *only* the burden on subscribers, that fact has never before been of significance when the taxes

2. The consequences to taxpayers of separately stating taxes also has importance in relation to state law. In *Tax Review Board* v. *Esso Standard Div.*, 424 Pa. 355, 227 A. 2d 657 (1967) the court held that the separately stated federal gasoline tax would not be included in calculating a local sales or "gross receipts" tax. The same result was reached in *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N. W. 908 (1937) on the theory that the state sales tax and federal gasoline tax attached simultaneously at the moment of sale. In the case at bar the state and local "messages" taxes and the communication services tax are generated simultaneously at the moment telephone service is purchased. See also *Crerar Clinch Coal Co.* v. *Board of Education*, 13 Ill. App. 2d 208, 141 N. E. 2d 393 (1957) (exempt taxpayer could not deduct sales tax from purchase price where tax was not separately stated).

were separately stated. In *Lash's Products* the tax was imposed on the manufacturer but, under this Court's opinion and the commissioner's own regulations, it would not have been included in the price of the goods had it been separately stated. In the processing tax cases cited above the tax was on the processer, but the buyers were entitled to refunds since the taxes would not be deemed part of the price paid if separately stated.

Congress also has recognized repeatedly, as has the IRS itself until its 1969 ruling in this case, that different federal tax consequences flow from the fact that taxes are separately stated, regardless of where the legal incidence of those taxes lie.[3]

(i) Thus, where Congress has considered specifically the question whether state and local sales taxes are part of the federal tax base, as it did in the retailers' excise taxes, former § 4051, IRC, it excluded such state and local sales taxes from the federal retailer excise tax base. Section 4051, which was repealed by the Excise Tax Reduction Act of 1965, provided that the tax base was to exclude, "if stated as a separate charge, the amount of any retail sales tax imposed by any State * * * or political subdivision * * *, *whether the liability for such tax is imposed on the vendor or the vendee.*"

(ii) The IRS reached the same result where the statute was silent and it had to pass on the question under the manufacturers' excise tax law. IRC § 4216(b) provides rules for determining a constructive sales price in the case of manufacturers' excise taxes, where those taxes are

3. The notion that no federal tax significance attaches to the fact that state and local taxes are separately stated *if* the taxes are imposed on the seller or person rendering the service had not the slightest foundation in federal law until the IRS fashioned its special 1969 tax ruling for this case long after this litigation had begun in 1967. Rev. Ruling 69-151, 1969-1 C. B. 288 (Jt. App. 27). While not expressly citing the 1969 ruling, the Court of Appeals clearly adopted it. See App. 12a.

based upon manufacturers' prices but the particular articles are sold at retail. Neither that provision nor the applicable regulations make specific reference to the treatment of local taxes. The IRS concluded (Rev. Rul. 63-37, 1963-1 C. B. 242) that the policy of equating the tax with what would be paid if the articles were sold to wholesale distributors, requires that a local tax which is equivalent to a sales tax (in the particular case involved the tax was referred to as a "gross income tax" or "privilege" tax) should not be considered part of the price upon which the manufacturers' tax is based.

(iii) In Revenue Ruling 63-8, 1963-1 C. B. 254, the IRS reached the same result regarding the cabaret tax (§ 4231(6)) and held that a state privilege tax imposed on certain retailing and service business activities could, if passed on to patrons, be excluded in determining the amount upon which the federal cabaret tax is to be computed. As in the case of the manufacturers' excise tax, the statute contained no explicit instructions regarding the treatment of state or local taxes. Although § 4231(6) was also repealed in 1965, the reasoning is especially relevant here since the cabaret tax provisions appeared in the same chapter as the communication services tax.

Based on the foregoing three reasons, as well as his discussions "with the national office of the Internal Revenue Service," Lawrence N. Woodworth, Chief of Staff of the Joint Committee on Internal Revenue Taxation, wrote Illinois Congressman Sidney Yates on January 16, 1967 that with respect to the state and local taxes here involved:

> "any state or local tax which is in substance a retail sales tax (regardless of the terminology used by the State or local government in describing that tax), *if the amount of the tax is separately stated on the bill, will be excluded from the amount upon which the communications tax will be based.*"[4]

4. The Government recognized in the court below that the taxes here are parallel to sales taxes.

A copy of this lettter is attached to the refund claims filed herein. (Supp. App. Ex. 4 to Ex. 1 and Ex. 3 to Ex. 3.)

The IRC also provides that retail occupation and gasoline excise taxes may be deducted from income taxes by consumers if separately stated and paid by them even though the taxes are imposed on their vendors. See IRC § 164(a)(b)(c). This is clear evidence that while state and local excise taxes may be imposed on vendors for state law purposes, federal law has long considered such taxes as imposed on the consumer, so long as they are separately stated and passed on to him. The Code recognizes, as did the Illinois Supreme Court with respect to the local taxes here involved, *East St. Louis* v. *Union Electric Co.*, 37 Ill. 2d 532, 229 N. E. 2d 522, *cert. denied*, 390 U. S. 948 (1967), as did the district court, 319 F. Supp. 421, App. 21a, 22a, indeed, as did the Court of Appeals, App. 6a, 7a, the economic reality that a separately stated tax falls on the consumer and that the seller or utility is merely a collecting conduit. The City of Chicago expressly recognized in the preamble to its amended tax ordinance that the taxes were being imposed in substance on the consumers, not the utility. See App. 29a.

This Court should grant its writ of *certiorari* to resolve finally this important issue of statutory construction, which bears not only on the communication services tax but also in the context of other federal (and state) tax laws where a distinction has been drawn with repect to taxes which are separately stated; to resolve conflicts with decisions of this Court and other federal courts; and to correct a decision which is in the teeth of the telephone tax statute, regulations and pre-1969 rulings. The decision below directly affects not only the 3,000,000 subscribers of IBT but also other telephone subscribers in the State of Illinois who obtain telephone service from non-Bell com-

panies.[5] The IBT subscribers alone have already been overtaxed by more than $10,000,000 between 1965 and 1969, and, unless this Court reviews the decision below, will continue to be overtaxed at the rate of more than $3,000,000 annually.

2. *Does a district court have jurisdiction of a class action under Federal Rule 23 to recover federal excise taxes?*

This is an important federal question which has not been, but should be, decided by this Court. The decision below is incompatible with holdings of this Court and other courts.

The basic issue here is one of federal jurisdiction—does Rule 23 of the Federal Rules of Civil Procedure apply to tax refund actions, or are such suits barred by the doctrine of sovereign immunity. The district court held that the Government has consented to suit only where each individual taxpayer has filed a claim for refund setting forth the amount due him and that a class refund claim will not satisfy jurisdictional requirements. 325 F. Supp. at 488; App. 23a-24a. This is an important issue which has given difficulty to lower federal courts but which has not, to our knowledge, been considered specifically by this Court.

There is no real dispute that if the district court has jurisdiction to apply Rule 23 to tax refund suits, this is a classic case for application of the rule.[6]

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5. The record does not disclose and petitioner does not know whether there are other state and local taxes in states other than Illinois which present the identical issue as here.

6. The Government conceded below that the prerequisites of Rule 23(a) are met. It is equally clear that the facts of this case bring it squarely within clauses (A) and (B) of Rule 23(b)(1). The Reporter to the Advisory Committee states that clause (A) "takes in cases where the party is obliged by law to treat the members of the class alike" and cites as illustrations "a utility acting toward customers" and "a government imposing a tax." Kaplan, note 8, *infra*, 81 Harv. L. Rev. 356, 388 (1967). Clause

Unless a class action is maintained millions of taxpayers whose individual claims are too small to warrant the filing of individual refund claims and refund suits will have no practical means of recovering their overpayments and the Government will retain an illegal multi-million dollar windfall. The courts frequently have held that in similar circumstances a class action is maintainable in order to open the door of justice to small claimants, to bring about efficiency in judicial administration and reduce the time and expense of the litigants and the courts in reaching a uniform decision on the merits affecting a large number of persons.[7] This tax refund action is unquestionably within the letter and purpose of Federal Rule 23 according to all leading commentators on the Federal Rules.[8]

(B) plainly applies since an adverse adjudication of plaintiff's claim "would as a practical matter be dispositive of the interests of the other members * * * or substantially impair or impede their ability to protect their interests." Indeed, the Court of Appeals disposed of the *Cleveland* case merely by disposing of the merits of the *Agron* case. Rule 23(b)(3) also applies. It can scarcely be doubted that one common question predominates over all others, namely, whether it is lawful to collect the tax by adding the state and local taxes to the federal tax base. This ultimate issue of governmental liability is the same as to petitioner and each member of the class. There is no sound reason why all subscribers and the Government should not receive the benefit or detriment of the final judgment on the merits.

7. See, e.g., *Escott* v. *Barchris Const. Corp.*, 340 F. 2d 731 at 733 (C. A. 2 1965), *cert.* denied sub nom., *Drexel & Co.* v. *Hall*, 382 U. S. 816; *Hohmann* v. *Packard Instr. Co.*, 399 F. 2d 711, 715 (C. A. 7, 1968); *Eisen* v. *Carlisle and Jacquelin*, 391 F. 2d 555, 560, 566-7 (C. A. 2, 1968); *Esplin* v. *Hirschi*, 402 F. 2d 94, 101 (C. A. 10, 1968) *cert.* denied, 394 U. S. 928 (1969); and *Green* v. *Wolf Corp.*, 406 F. 2d 291, 297, 300, 301 (C. A. 2, 1968), *cert.* denied, 395 U. S. 977 (1969).

8. See the Advisory Committee's note to Rule 23, 39 F. R. D. 69, 100-104; Kalven and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi. L. Rev. 684, 685, 692-3, 694-5, 698, 699, 714-717 (1941), a leading article relied on by the Committee; and an article by the Reporter to the Committee written in an unofficial capacity, Kaplan, *Continuing Work of the Civil Commit-*

The Government's alternative to a class action is for each of 3,000,000 telephone subscribers to file individual refund claims and follow the administrative refund-litigation route taken by petitioner. But everyone knows that several million subscribers with claims of $25.00 or less are simply not going to take the path of administrative strangulation. If they did, the Government would be faced with the impossible task of processing and determining the validity and accuracy of several million small claims, a result which the Government would hardly desire and of course does not anticipate. Moreover, only those subscribers who have retained their complete monthly telephone bills for many years can determine the amount of their individual claim. In sum, the Government's "alternative" to a class action would insure the death knell of refunds to a large class of small claimants, is without support in law and is an ignoble effort to avoid payment of millions of dollars of tax refunds to millions of small taxpayers.

Nevertheless, the district court accepted the Government's contention that it did not have jurisdiction under Count II to maintain a class action. The court said that the claim filed by petitioner on behalf of the class was "unsatisfactory" and that each subscriber must file his own claim setting forth the amount due and exhaust his administrative remedy. 325 F. Supp. at 488, App. 23a-24a. In effect, the court applied the doctrine of sovereign immunity. The court reached this result by relying upon: IRC § 7422(a) which states that no tax refund suit shall be maintained "until a claim for refund . . . has been . . . filed", the regulations with respect thereto, 26 C. F. R. § 301.6402-2; and various lower court cases, including

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tee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 387-8, 390, 391 (1967). See also, 3B Moore's Fed. Prac. (2d Ed. 1969) ¶ 23.95, p. 23-1851, which states that a class action will lie against the United States for tax refunds.

Herrington v. *United States*, 416 F. 2d 1029 (C. A. 10, 1969); *Harkins* v. *United States*, 66-2 U. S. T. C. ¶ 9543 (E. D. Okla. 1966), aff'd on other grounds, 375 F. 2d 239 (C. A. 10, 1967); *McConnell* v. *United States* 293 F. Supp. 605 (E. D. Tenn. 1969); and *Lipsett* v. *United States* 37 F. R. D. 549 (S. D. N. Y. 1965), aff'd 359 F. 2d 956 (C. A. 2, 1966). While these cases are in certain respects distinguishable[9] or support petitioner, in other respects they appear to support the decision below. For the reasons stated below the decision of the district court was wrong, is in conflict with other decisions of this Court and lower federal courts, and there is need for the exercise of this Court's supervisory powers now.[10]

A. The district court's application of sovereign immunity to limit its jurisdiction conflicts with decisions of this Court and other courts. The Government has consented to be sued for tax refunds. Section 1346(a)(1) of the Judicial Code, 28 USC § 1346(a)(1), upon which this action is based, confers original jurisdiction in the district courts over "any civil action against the United States for the recovery of any . . . tax. . . ." When consent is given "it is liberally construed", and no "sensible reason can be imagined why" the remedy should be paralyzed. *United States* v. *Yellow Cab Co.*, 340 U. S. 541, 554-5 (1951).[11] In

9. For example, they involved income tax refunds which may present additional issues not relevant here.

10. Petitioner's efforts to secure class relief commenced in November, 1967 when his first suit was filed. If this Court should decide only the merits and remand the class action issue to the Court of Appeals, it will be at least six years before the latter issue is finally adjudicated. If it should be decided that a class refund action does not lie, the delay will work an injustice to taxpayer-subscribers because even those whose claims are large enough to warrant individual action will have their claims cut down by the three-year statute of limitations on tax refunds.

11. See also 3A Moore's Fed. Prac. (2d Ed. 1969) ¶ 20.07[3], p. 2864.

Yellow Cab this Court observed that Congress made the Federal Rules of Civil Procedure applicable under the Tort Claims Act, 28 USC § 1346(b), and held that the Government could be sued as a third-party defendant, notwithstanding a claim of sovereign immunity. See especially 340 U. S. 553, n. 9 and S. Rep. No. 1559, 80th Cong., 2d Sess. 11-12. Since § 1346(a)(1) with respect to tax refund actions and § 1346(b) with respect to Tort Claim actions were enacted at the same time and since both provide for federal jurisdiction over "any civil action" it is clear that Congress considered the Federal Rules were applicable to tax refund as well as to Tort Claim actions. Accordingly, even if Rule 23 could be construed as an extension of the jurisdiction of the court—which it is not—this authority was plainly granted by Congress in 28 U. S. C. § 1346(a)(1).[12]

There is nothing in IRC § 7422(a) which expressly bars a class refund claim. Nor is there anything in Regulation § 301.6402-2, which expressly prohibits a claim on behalf of a class. Petitioner did file a refund claim on behalf of the class. The claim was denied. Hence, federal jurisdiction exists.[13]

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12. This conclusion is supported also by the fact that Congress has denied injunctive and declaratory relief in tax matters. See 26 U. S. C. § 7421(a) and 28 U. S. C. § 2201. If Congress had intended for class relief under Rule 23 to be inapplicable to tax refund actions it would have said so.

In *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 641-644 (D. Kan. 1968) the court held that a class action could be maintained against the United States under the Tort Claims Act and the Tucker Act (28 USC § 1346(a)(2)) even though the Government argued that it is not liable to suit by a class without its consent.

13. The class claim here meets the purpose and requirement of the statute and regulation. Supp. App. Ex. 3. It fully apprises the Government of the nature of the claim and avoids litigating "every claim" asserting identical grounds for relief. *Herrington* v. *United States*, 416 F. 2d 1029, 1032 (C. A. 10, 1969). The fact that the precise amount of refund due each subscriber or

B. The district court also erred in concluding that each member of petitioner's class must file a refund claim and exhaust his administrative remedy. The exhaustion doctrine is inapplicable where, as here, there is involved only an issue of law and there is nothing of an administrative nature to be done. *Houghton* v. *Shafer*, 392 U. S. 639, 640 (1968); *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145, 148 (CA 5, 1936), *cert. denied*, 298 U. S. 688; *Koepke* v. *Fontecchio*, 177 F. 2d 125, 128 (CA 9, 1949); *Wolff* v. *Selective Service Board*, 372 F. 2d 817, 825 (CA 2, 1967); *Hammond* v. *Lenfest*, 398 F. 2d 705, 713, 714 (CA 2, 1968); *Foley* v. *Hershey*, 409 F. 2d 827 (CA 7, 1969).

Even if applicable, the exhaustion doctrine has been satisfied by petitioner. His individual and class claims have exhausted the administrative remedy on behalf of himself and all other subscribers, and thereby vested the district court with jurisdiction on behalf of all. In *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (C. A. 5, 1968), the court held that a class action could be maintained under § 706(c), of the Civil Rights Act of 1964, 42 U. S. C. § 2000-5(c), even though the members of the class had not filed a charge with the Equal Employment Opportunity Commission, *a condition precedent to seeking judicial relief under § 706(e).* The court said (p. 498): "* * * once an aggrieved

to all subscribers is not stated in the claim is of no consequence. The regulations and statute do not require it. *National Forge & Ord. Co.* v. *United States*, 151 F. Supp. 937, 941 (Ct. Cl. 1957); *Burrell* v. *Fahs*, 232 F. 2d 163, 166 (CA 5, 1966); *Electric Storage Battery Co.* v. *McCaughn*, 54 F. 2d 814 (E. D. Pa. 1931). What the refund claim and this action seek is the total refund due to all subscribers as a class. This amount can be ascertained from IBT records so that the total refund paid by the United States will not exceed the amount overcollected. Thereafter, IBT, as the Government's collecting and disbursing agent, may make refunds to subscribers in such manner that will do substantial if not precise justice to them. See Rappaport Affidavit, Jt. App. 81-87. "In the administration of Internal Revenue Laws, we are concerned with substance and not form." *Kales* v. *United States*, 115 F. 2d 497, 500 (CA 6, 1940), aff'd 314 U. S. 186 (1941).

person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated * * *." See also, *Metcalf* v. *Swank*, 444 F. 2d 1353, at 1358 (C. A. 7, 1971).

C. The district court overlooked its inherent equity jurisdiction to grant class relief. Federal Rule 23 stands on a different footing than other procedural rules. As this Court said in *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356, 366 (1921) [Reaffirmed in *Snyder* v. *Harris*, 394 U. S. 332, 340, 355, n. 23 (1969)]:

> "It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system, and were in use in English chancery. 1 Street, Fed. Eq. Pr. § 549."

On this basis this Court held that despite the jurisdictional diversity requirement of § 238 of the Judicial Code (now 28 U. S. C. § 1332) if requisite diversity existed between the original parties, federal jurisdiction is not ousted merely because later intervenors or members of the class represented by the original parties are citizens of the same state as an adverse party.

The jurisdictional restraint, if any, of IRC § 7422(a) is no more applicable to class actions than is the jurisdictional restraint of § 1332 of the Judicial Code (28 U. S. C. § 1332) imposing the diversity requirement. The petitioner, having satisfied the jurisdictional requirements by filing a refund claim, can maintain a class action for subscribers who have not made such a claim, in the same manner as a plaintiff who has satisfied the diversity of citizenship requirement can bring a class action for persons similarly situated who cannot satisfy the diversity requirements. Since the court unquestionably had jurisdiction under 28 U. S. C. § 1346(a)(1) to grant relief to petitioner, it also had jurisdiction to grant relief to the class.

Conclusion.

For the reasons hereinabove stated, petitioner respectfully requests that this Court issue a Writ of Certiorari to the Court of Appeals for the Seventh Circuit, reverse the judgment of that court and grant such other relief as may be appropriate.

Respectfully submitted,

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December 17, 1971.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September 22, 1971.

Before SWYGERT, *Chief Judge,* DUFFY, *Senior Circuit Judge,* and FAIRCHILD, *Circuit Judge.*

SWYGERT, *Chief Judge.* The substantive issue in these three appeals[1] is whether certain occupation taxes imposed on Illinois Bell Telephone Company (IBT) by the State of Illinois and various Illinois municipalities are properly includable in the base on which is computed the federal excise tax on "amounts paid for . . . communication services" under section 4251 of the Internal Revenue Code of 1954. Our resolution of this issue disposes of all three appeals.

Since there was no dispute as to any material fact, the Agron case was determined on cross-motions for summary judgment. Indeed, the case turns wholly on the interpretation and application of various state and federal statutes. The plaintiff, Robert C. Agron, a Chicago resident, is furnished telephone service by IBT. As a telephone subscriber, he is subject to the federal communications tax imposed by section 4251. IBT is required by section 4291 of the Code to collect the federal taxes which are imposed

1. Pursuant to stipulation, Nos. 71-1022 and 71-1023 were ordered consolidated. By order No. 71-1138 was argued together with Nos. 71-1022 and 71-1023. For convenience, we will defer discussion of No. 71-1138 to the end of this opinion.

upon its customers, and under section 7501(a) it must hold them in "a special fund in trust for the United States." The amounts collected are paid over to the Internal Revenue Service each month. Treas. Reg. § 49.6302(c)-1. Agron contends that IBT, by including in the federal tax base those amounts identified on his telephone bills as attributable to state and local taxes, has improperly computed the federal tax which it collects from its subscribers and pays over to the United States.[2]

For years the State of Illinois has imposed a "Messages Tax" on "persons engaged in the business of transmitting messages" which is measured by the "gross receipts from such business." Ill. Rev. Stat. ch. 120, §§ 467.1, 467.2 (1969). This tax was generally imposed at the rate of three percent until 1965 when the rate was increased to four percent. In 1967 the rate was further increased to five percent. In addition to the state tax, IBT is subject to certain local messages taxes. In 1955 Illinois authorized municipalities to tax "Persons engaged in the business of transmitting messages by means of electricity, at a rate not to exceed 5% of the gross receipts from such business originating within the corporate limits of the municipality." Ill. Rev. Stat. ch. 24, § 8-11-2 (1969). Many Illinois municipalities, including the City of Chicago, have exercised this authority to tax IBT.

At the same session at which municipalities were au-

2. Agron's position may be illustrated by reference to a typical telephone bill sent to him by IBT. His January 19, 1967 bill listed the following charges:

	Due to taxes*	U. S. Tax	Total
Telephone service — $17.50	.59	1.81	$19.90

*City and State Taxes.

As can be seen, IBT added the amount attributed to "City and State Taxes" to the basic charge for telephone service and arrived at a base for the federal tax of $18.09. Agron contends that his federal tax should have been $1.75 (10% of $17.50), rather than $1.81 (10% of $18.09).

thorized to tax IBT, the Illinois legislature added subsection (a) to Ill. Rev. Stat. ch. 111⅔, § 36 (1969). That addition provided that whenever a municipality exercised the authority to impose an occupation tax on a utility:

> such utility may charge its customers, in addition to any rate authorized by this Act, an additional charge equal to the sum of (1) an amount equal to such municipal tax, or any part thereof, (2) 3% of such tax, or any part thereof, as the case may be, to cover costs of accounting, and (3) an amount equal to the increases in taxes and other payments to governmental bodies resulting from the amount of such additional charge.

IBT imposes this additional charge by filing a supplemental schedule applicable to the municipality which had imposed the tax. Such a supplemental schedule, if it falls within the legislative authorization cannot be suspended by the Illinois Commerce Commission.[3] Section 36(a) also provides that the additional charge:

> shall be made by the addition of a uniform percentage to the amounts payable for intrastate utility service in such municipality and shall be shown separately on the utility bill to each customer.

In 1965, when Illinois increased the rate of the state messages tax, the legislature again amended section 36 by adding subsection (b). This addition performed essentially the same function as subsection (a): it authorized an additional charge to offset any increase in the state tax rate above the prior rate of three percent and provided

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3. When Illinois municipalities have imposed or increased the local messages tax, IBT has almost invariably filed supplemental schedules to recoup the amount of the tax from its customers. On at least one occasion, however, an inadvertent delay in the preparation of a supplemental schedule resulted in IBT's bearing an increased rate of municipal tax for two and one-half months without recouping the amount of the tax from its subscribers.

that IBT could file immediately effective supplemental schedules to recoup any such tax increase.[4]

IBT has computed the federal excise tax which it collects for the government from its customers on a base which includes the separately stated state and local taxes imposed on it. According to Agron this procedure resulted in an overstatement of his federal tax. His efforts to recover the alleged overpayment began in 1967 when he filed a class action against IBT. The suit was eventually dismissed for lack of jurisdiction apparently on the ground that it was essentially a tax refund suit and the jurisdictional requirement of section 7422(a) of the Internal Revenue Code that the taxpayer file a refund claim before bringing such a suit was not complied with. Agron then filed two refund claims, one on behalf of himself individually and another on behalf of himself and all similarly situated subscribers to IBT's services and also on behalf of IBT, and brought the instant suit for refund.

Agron initially named IBT and the United States as defendants in all three counts of his complaint. Count I sought recovery of the amount of Agron's individual tax refund claim; Count II asserted a claim for refund of taxes on behalf of a class consisting of all of IBT's subscribers; and Count III sought a refund not only on

4. Although the additional charge authorized by section 36(h) apparently is not required to be separately stated on the subscriber's telephone bill, IBT has added the amount of the increased state taxes in excess of three percent to the amount of local taxes and has stated the two in one separate category designated as attributable to state and city taxes. Agron seeks recovery only of the amount of federal tax attributable to the inclusion of the separately stated state and local taxes in his federal tax base; he does not contend that the federal tax base should not include the three percent state messages tax which has for many years been imposed on IBT and which although not separately stated, is recouped from IBT's subscribers through rates established after the formal procedure of notice and hearing provided by Ill. Rev. Stat. ch. 111⅔, § 36 (1969).

behalf of all IBT subscribers, but also on behalf of IBT. The Government moved that all three counts be dismissed, but suggested that Count I would state a jurisdictionally sound cause of action if IBT were not joined as a defendant.[5] Agron then voluntarily dismissed IBT from Count I and moved for summary judgment on all three counts. The Government answered Count I and filed a cross-motion for summary judgment on that count while persisting in its claim that the court lacked jurisdiction over Counts II and III. IBT moved for summary judgment on Counts II and III on the ground that it was not a necessary or a proper party.

The district court granted Agron's motion for summary judgment against the United States on Count I[6] and subsequently denied Agron's motion for summary judgment on Counts II and III, ruling in effect that the refund claims filed by the plaintiff on behalf of IBT and the members of the class he purports to represent were not sufficient to satisfy the jurisdictional requirement for maintaining a statutory refund suit. Int. Rev. Code of 1954, § 7422(a). The district court granted Agron judgment for $23.98 against the United States on Count I and dismissed Counts II and III for lack of jurisdiction. Agron appeals the dismissal of Counts II and III and the Government appeals the judgment for Agron on Count I.

We hold that IBT properly computed the federal tax which it collects from its customers and that the district court erred in entering judgment for Agron on Count I.

5. The Government's jurisdictional objection to Count I was based on its contention that under 28 U. S. C. § 1346(a)(1), as interpreted in *United States* v. *Sherwood*, 312 U. S. 584 (1941), joinder of any other defendant with the United States is impermissible. Accordingly, the dismissal of IBT from Count I removed the alleged jurisdictional defect.

6. *Agron* v. *Illinois Bell Tel. Co.*, 319 F. Supp. 418 (N. D. Ill. 1970).

That holding disposes of these appeals and we need not consider the correctness of the district court's order dismissing Counts II and III.

Agron first contends that as a matter of Illinois law, those state and local taxes which are separately stated on his telephone bill, while nominally imposed on IBT, are actually direct taxes on telephone subscribers and that his payment of taxes imposed on him by the State of Illinois and the City of Chicago cannot be included in "amounts paid for . . . communication services" under section 4251(*a*) of the Internal Revenue Code.[7]

The Illinois statutes authorizing and imposing a tax on the occupation or business of transmitting messages by means of electricity are explicit. Ill. Rev. Stat. ch. 120, § 467.2 and ch. 24, § 8-11-2 (1969). For instance, section 467.1 provides that: " 'Taxpayer' means a person engaged in the business of transmitting messages"; and section 467.2 states that: "A tax is imposed upon persons engaged in the business of transmitting messages in this State." It would be difficult to interpret such specific language as imposing a tax on telephone subscribers. It may be that IBT normally "passes on" to its subscribers the economic burden of the state and local occupation taxes just as every unsubsidized business must "pass on" and recover from its customers every item of operating expense —including state and federal taxes—if it is to operate

7. We have assumed, with Agron, that if the state and local taxes in question were actually direct taxes imposed on telephone subscribers, then amounts attributable to those taxes could not be considered "amounts paid for . . . communication services." Because we hold that the State of Illinois does not consider its state and local taxes to be direct taxes on subscribers, we need not reach and do not decide that question.

8. However, as we pointed out in note 6, *supra*, on at least one occasion IBT was forced to bear an increased rate of municipal tax for two and one-half months. Agron does not suggest that IBT's failure to "pass the tax on" to its subscribers in any way affected its liability to pay the tax.

profitably.[9] But the fact that the telephone subscriber ultimately bears the financial burden of the tax does not justify our ignoring the clear language of the Illinois statutes and holding that the tax is "imposed" on subscribers.

The decisions of the Illinois Supreme Court make clear that it is the privilege of carrying on certain businesses within the state that the legislature intended to tax in enacting the occupation taxes. *See, e.g., People's Drug Shop, Inc.* v. *Moysey*, 384 Ill. 283, 285-87, 51 N. E. 2d 144, 146 (1943). In *Reif* v. *Barrett*, 355 Ill. 104, 109, 188 N. E. 889, 892 (1933),[10] the court stated that the purpose of an occupation tax is:

> [E]ither to regulate and control a given business or occupation, or to impose a tax for the privilege of exercising, undertaking or operating a given occupation, trade or profession. Its effect is to license a person engaged in a given calling or occupation. A license in form may not be issued to a taxpayer but the payment of the tax is the license under the authority of the State to engage in such occupation.

Thus it is apparent that Illinois has not considered its occupation taxes to be direct taxes on consumers.

Even though the economic burden of the occupation taxes is "passed on," the Illinois courts have consistently

9. *Cf. FPC* v. *United Gas Pipe Line Co.*, 386 U. S. 237, 243 (1967); and *Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388, 399 (1922). In those cases the Supreme Court stated that an allowance for taxes should be included in determining regulated utilities' expenses for purposes of fixing rates which will provide a fair return. Thus the economic burden of the federal taxes is "passed on" to consumers but that does not result in the taxes' being "imposed" on consumers.

10. *Reif* v. *Barrett*, insofar as it held that the Illinois Constitution limited the legislature to property taxes, occupation taxes and franchise or privilege taxes, was overruled by *Thorpe* v. *Mahin*, 43 Ill. 2d 36, 45, 250 N. E. 2d 633, 637 (1969). *See* n. 11, *supra*.

ruled that such taxes are not imposed on consumers. In *Winter* v. *Barrett*, 352 Ill. 441, 455-56, 186 N. E. 113, 120-21 (1933), the court rejected the argument that the state tax on those engaged in the business of selling personal property at retail was imposed on consumers. The court pointed out that retailers could take the tax into consideration in fixing the selling price of their goods, "the same as they do their property taxes, rent and other expenses of doing business"; but the court held that the tax remained on the seller and that the seller must report and pay tax on the full amount he receives for his property, including any amount added to the price to compensate for the tax. *See also Vause & Striegel, Inc.* v. *McKibbin*, 379 Ill. 169, 173, 39 N. E. 2d 1006, 1008 (1942). The Illinois Supreme Court used the same reasoning to reject an analogous argument by a liquor retailer who contended that federal and state taxes nominally imposed on distillers were actually "passed on" to retailers and ultimately to consumers and that amounts attributable to those taxes could not be included in gross receipts subject to the occupation tax on retailers. *Fischman & Sons, Inc.* v. *Department of Revenue*, 12 Ill. 2d 253, 146 N. E. 2d 54 (1957). *See also People* v. *Werner*, 364 Ill. 594, 5 N. E. 2d 238 (1936). A three-judge federal district court has followed the Illinois courts in ruling that the Illinois Retailers' Occupation Tax—even if passed on—is not imposed on consumers. *United States* v. *Department of Revenue*, 202 F. Supp. 757 (N. D. Ill.), *aff'd per curiam*, 371 U. S. 21 (1962).

Even if the language of the Illinois statutes and court decisions were less clear, a further bar exists to our accepting Agron's argument that the state and local occupation taxes are imposed on consumers. For many years the Illinois Supreme Court consistently ruled that the state constitution, art. IX, § 1, limited the legislature

to three forms of taxation: (1) property taxes on a valuation basis, (2) occupation taxes, and (3) franchise or privilege taxes.[11] This restrictive interpretation of the state constitution was recently disavowed by *Thorpe* v. *Mahin*, 43 Ill. 2d 36, 42-45, 250 N. E. 2d 633, 636-37 (1969); but the tax on IBT was obviously intended, when enacted, to fall within the constitutional authorization of taxes on occupations. We may not ignore the obvious intention of the Illinois legislature and rule that this occupation tax is a direct tax on consumers. Further, the title of the state taxing statute applicable to IBT is, "An Act in relation to a tax upon persons engaged in the business of transmitting messages"; and under art. IV, § 13 of the state constitution, no tax may be imposed upon persons not described in the title of the taxing statute. *See, e.g., International Business Machines Corp.* v. *Department of Revenue*, 25 Ill. 2d 503, 185 N. E. 2d 257 (1962). *Cf. Central Television Serv. Inc.* v. *Isaacs*, 27 Ill. 2d 420, 189 N. E. 2d 333 (1963).[12]

Agron's argument that the occupation tax on IBT is imposed on him and other telephone subscribers rests entirely on certain language in a recent case, *East St. Louis* v. *Union Elec. Co.*, 37 Ill. 2d 537, 542-43, 229 N. E. 2d

11. *See, e.g., Reif* v. *Barrett*, 355 Ill. 104, 110, 188 N. E. 889, 893 (1933); *Bachrach* v. *Nelson*, 349 Ill. 579, 589, 182 N. E. 909, 913 (1932). Only recently has the Illinois Supreme Court, in upholding the state income tax, Ill. Rev. Stat. ch. 120, §1-101 (1969), overruled *Reif* and *Bachrach* and held that Ill. Const. art. IX, § 2, broadened the forms of taxation beyond those stated in art. IX, § 1. *Thorpe* v. *Mahin*, 43 Ill. 2d 36, 42-45, 250 N. E. 2d 633, 636-37 (1969). Even then, the court referred to the tax as one on the privilege of receiving income. 43 Ill. 2d at 45, 250 N. E. 2d at 638.

We note that Illinois recently adopted a new constitution generally effective July 1, 1971. However, the new constitution is not relevant to our interpretation of statutes passed many years ago under the old constitution.

12. A municipal tax upon persons not described in the authorizing statute is also void. *Cf. Wabash R. R.* v. *Department of Revenue*, 28 Ill. 2d 128, 191 N. E. 2d 244 (1963).

522, 525 (1967), *cert. denied*, 390 U. S. 948 (1968), to the effect that the burden of a certain municipal occupation tax fell directly on consumers:

> On a literal and superficial view it might appear as if the utility tax ordinance imposed a tax burden upon the Company, but on examination it is evident that the burden was placed on the consumers. The Company as authorized simply passed on the new charges to its consumers and the consumers not only paid such charges to the City but also paid the Company the expenses it incurred while serving as a collector or conduit of taxes from the consumers to the City. . . .

The district court accepted Agron's argument and, relying on *East St. Louis*, ruled that "Illinois does not consider these amounts on the telephone bill due to state and local taxes to be levies on the company, but, rather, charges on the telephone subscriber." 319 F. Supp. at 421. We disagree. *East St. Louis* involved the construction of a 1948 municipal ordinance which granted the Union Electric Company the right to operate its distribution system within the City of East St. Louis. In return, the company agreed to pay annually the amount by which certain percentages of its gross receipts exceeded all other payments to the city for "fees, licenses, charges, taxes or other exactions . . . imposed by any valid ordinance of the City of East St. Louis." In 1960 when the city imposed a municipal occupation tax on the company, a controversy developed over whether the occupation tax was a "tax" within the 1948 franchise ordinance. If it were, the electric company would have had no further liability for franchise payments. The company, although it passed on the occupation tax to its customers, refused to make further franchise payments and asserted that to require it to do so would unconstitutionally impair its franchise contract with the city.

The question before the Illinois Supreme Court was whether an occupation tax which imposed no additional economic burden on the electric company fell within the intendment of "taxes" as expressed in the city's 1948 ordinance. Relying on the rule that, "A state or ordinance must receive a sensible construction, even though such construction qualifies the universality of its language," *Elmhurst* v. *Buettgen*, 394 Ill. 248, 253, 68 N. E. 2d 278, 282 (1946), the court held that the company's liability for the occupation tax did not discharge its obligation to make franchise payments.

East St. Louis does not support the district court's ruling since it merely recognized the economic reality that the ultimate consumer bears the burden of all prior taxes imposed on those from whom he receives goods or services. That case held only that the parties did not intend in 1948 that the imposition in the future of a tax which imposed no burden on the electric company would discharge its obligations under the franchise ordinance. We agree with the Government that the Illinois Supreme Court could hardly have intended by its decision to rewrite whole sections of the statutes and ordinances imposing occupation taxes on utilities.

From the foregoing, we conclude that the statement of the Illinois Supreme Court in *People's Drug Shop, Inc.* v. *Moysey*, 384 Ill. 283, 287, 51 N. E. 2d 144, 146 (1943), concerning the Retailers' Occupation Tax is applicable to the state and local occupation taxes presently imposed on IBT: "'Unambiguous provisions of the . . . Act proclaim, and the decisions of this court uniformly hold, that the tax imposed is upon retailers and not upon consumers, and that the sole duty of paying the tax rests upon the former."

Agron next contends that even if separately stated state and local messages taxes are not directly "imposed"

on telephone subscribers, they are, nevertheless, identified as taxes and ought not be considered a charge for telephone service within the meaning of section 4251(a) of the Internal Revenue Code. The Government counters that the additional charge is merely part of the compensation demanded by IBT for furnishing the service of transmitting messages; thus, amounts paid to reimburse IBT for its payment of the state and local messages taxes—just as amounts paid to reimburse IBT for all other taxes and for labor costs and equipment repairs—are paid for telephone service within the meaning of the statute. We agree with the Government. All costs incurred in making a product or service available—including the cost of federal, state and local taxes—are ultimately borne by consumers. That the cost of taxes imposed on manufacturers and retailers is added into the price at which goods are sold, even if such taxes are itemized and specifically identified, simply increases the price the consumer must pay to receive the goods or services.

Additional charges contained in supplemental schedules filed by IBT under Ill. Rev. Stat. ch. 111⅔, §§ 36(a) and 36(b) (1969), even though in economic terms they result in the passing on of the burden of state and local messages taxes to subscribers, are simply a part of the price such subscribers must pay to IBT to receive telephone service.[13] Agron argues that the additional charges are not a part of IBT's price for its services because these charges are not authorized by rate schedules arrived at independently by the Illinois Commerce Commission after notice and hearing.

13. Perhaps it might also be argued that even direct federal, state and local taxes on subscribers are a part of the "price" those subscribers must pay to receive telephone service. But that simply illustrates the extent to which the problem presented by this case is one of semantics; it does not change our view that amounts IBT demands, under schedules authorized by Illinois law, as reimbursement for taxes it pays are as much a part of its price for its services as amounts reimbursing it for labor or equipment costs.

We deem this fact to be without significance. The additional charges were authorized by the Illinois legislature which, in enacting sections 36(a) and (b) of Ill. Rev. Stat. ch. 111⅔ (1969), was not imposing a tax on consumers or creating a new type of charge for utility service but was simply providing a convenient, efficient procedure by which IBT could bypass the costly administrative rate-making procedure and obtain minor increases in the authorized rate for its services.

In his attempt to show that the additional charges collected by IBT are not a part of the price for telephone service, Agron argues that persons living in cities which have not imposed a local tax on IBT receive the same service at a lower price than persons living in cities where a local tax on IBT is in effect. For example, according to Agron, the basic charge for a three minute call between Chicago and Lincoln, Illinois, is $1.00. Using Agron's figures, if the call originates in Lincoln, the total charge is $1.10—$1.00 plus ten cents federal tax; however, if the call originates in Chicago, the total charge is $1.16—$1.00 plus five cents local tax, plus eleven cents federal tax. Agron concludes that the Chicagoan is required to pay ten percent more federal tax for the identical service because of the inclusion of Chicago's separately stated local tax in the determination of the charge for the service. Agron has failed to recognize, however, that Chicago, by imposing a municipal tax on IBT, has increased the cost of IBT's doing business within the city with the consequence that Chicago residents must pay more *for telephone service* to provide IBT a fair return. Since the federal tax is based on "the sum of all charges for . . . [telephone] services included in the [consumer's] bill," it follows that the amount of federal tax which Chicago residents must

pay would increase,[14] and neither IBT nor the State of Illinois can defeat that result by providing for the itemization of those amounts passed on to consumers which are attributable to taxes on IBT. *Cf. Wause & Striegel, Inc. v. McKibbin*, 379 Ill. 169, 173, 39 N. E. 2d 1006, 1008 (1942).

In *Lash's Products Co. v. United States*, 278 U. S. 175 (1929), the Supreme Court was faced with an argument essentially identical to that made by Agron. There, a manufacturer, who was subject to a federal tax computed on the price at which he sold certain products and who had notified his customers that the price of his products reflected his tax liability, argued that amounts which he received from his customers to reimburse him for his

14. The Government places much reliance on the fact that Congress provided that the tax be computed on "the sum of all charges." We agree that that language indicates a general congressional intention that the amount charged by a telephone company should not be broken down into its component parts for purposes of computing the tax. For instance, it is clear that no attempt should be made to separate out the amounts attributable to taxes, of whatever kind, which were considered by the Illinois Commerce Commission in fixing IBT's general rate structure. Agron concedes this by his failure to seek recovery of any taxes attributable to the inclusion in the federal tax base of amounts which IBT receives as reimbursement for its payment of that part of the toll messages tax (the initial three percent) which is not separately stated.

However, Agron correctly points out that the "sum of all charges" language does not itself solve the problem presented in these appeals; for it is only the sum of all charges *for telephone service* which is subject to tax. The Government appears to concede that not every charge which might be contained in a telephone bill should be included in the federal tax base. For instance, amounts paid by telephone subscribers in order to be listed in "yellow page" directories are considered payments for advertising rather than for telephone service and are not subject to the federal tax. *See* Revenue Ruling 58-299, 1958-1 Cum. Bull. 436; *cf.* Revenue Ruling 68-92, 1968-1 Cum. Bull. 488. Thus the crux of the problem before us remains whether the additional charge stated on IBT's bills is an increase in the price *for telephone service* resulting from IBT's liability for the state and local occupation taxes.

obligation to pay the federal tax were not a part of the "price" of his products and could therefore not be included in the base on which the federal tax was computed. In effect, the manufacturer argued, as does Agron here, that amounts attributable to his tax liability were not charges for the product but were for taxes. The language of the Supreme Court in rejecting the manufacturer's argument, 278 U. S. at 176, is equally applicable to Agron's claim:

> [T]he tax is laid and remains on the manufacturer and on him alone. . . . The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all.
>
> . . . . . .
>
> The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price. . . .[15]

Applying the Court's reasoning to Agron's argument, we conclude that even though the additional charges imposed on Agron and other telephone subscribers may be directly attributable to state and local taxes paid by IBT, those additional charges are nonetheless a part of the price IBT demands for its services. Accordingly, they are properly includable in the base on which the federal tax on "amounts paid for . . . communication services" is computed.

---

15. *Cf. James* v. *Dravo Contracting Co.*, 302 U. S. 134, 160 (1937); *Dow Jones & Co.* v. *United States*, 128 F. Supp. 748 (Ct. Cl. 1955); *Sun Oil Co.* v. *Gross Income Tax Div.*, 238 Ind. 111, 149 N. E. 2d 115 (1958); *Fischman & Sons, Inc.* v. *Department of Revenue*, 12 Ill. 2d 253, 146 N. E. 2d 54 (1957); *Hoffman* v. *City of Syracuse*, 2 N. Y. 2d 484, 141 N. E. 2d 605 (1957); *People* v. *Werner*, 364 Ill. 594, 5 N. E. 2d 238 (1936). These cases recognize that increases in the amount a purchaser must pay for goods or services in order to compensate the seller for taxes imposed on him or on those from whom he purchased the goods are a part of the "price" of the goods themselves. The prior taxes merely increase the cost of the goods.

In sum, we conclude that the procedure by which IBT computes and collects the tax imposed by section 4251 of the Internal Revenue Code does not result in any over-assessment of the federal tax and that the district court erred in granting a tax refund to Agron. This holding renders moot the issues presented by Agron's appeal. Since we hold that there was no underlying cause of action on which a class suit could be based, we need not reach the procedural problems raised by Agron's attempting to bring a class or derivative action for tax refund, and we intimate no opinion on the correctness of the district court's dismissal of Counts II and III.

Our ruling on the merits of Agron's claim also disposes of the Clevelands' appeal. Their original complaint was filed in the Circuit Court of Cook County on behalf of themselves and all similarly situated IBT subscribers. That suit was against IBT alone and alleged the same improper computation of federal tax as was asserted by Agron. After removal to the federal district court, the plaintiffs filed an amended complaint naming the United States as defendant with IBT. Both defendants sought dismissal of the complaint on the ground, among others, that the plaintiffs had failed to file an administrative refund claim as required by section 7422(a) of the Internal Revenue Code. The district court granted the dismissal.

The Clevelands rely on essentially the same facts as those presented by Agron but urge a different legal theory. They argue that their suit is not for refund of taxes and that their dispute is solely with IBT, whom they contend has overcharged its customers without authority under either federal or state statute. They argue that, accordingly, the United States need not be a party and that the filing of an administrative tax refund claim is not a prerequisite to their bringing suit.

Because we hold that IBT properly computed the federal tax in accordance with the provisions of the Internal Revenue Code, the underlying basis of the Clevelands' complaint falls and therefore we need not decide whether the Clevelands should have been required to file an administrative tax refund claim or, who, as between IBT and the federal government, might be liable for any alleged overcharge.

The order granting Agron's motion for summary judgment and denying the Government's motion for summary judgment as to Count I of Agron's complaint is reversed; the order dismissing the Clevelands' complaint is affirmed; and Agron's appeal from the dismissal of Counts II and III of his complaint is dismissed as moot.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT.
(Caption—69-C-1972).

MEMORANDUM OPINION:

Cross-motions for Summary Judgment on Count I.

This is an action for the refund of certain federal excise taxes on telephone service alleged to have been overpaid since and including the last quarter of 1965. In addition to the alleged overpayments or overcollections, depending on one's view, plaintiff seeks statutory interest.

The Complaint consists of three counts. Count I, brought by Robert C. Agron, a subscriber to the telephone services of the Illinois Bell Telephone Company (IBT), against the United States raises the narrow, if perplexing, legal issue of the taxability of certain amounts set forth on plaintiff's telephone bill. Count II is brought as a class action by plaintiff on behalf of all telephone subscribers similarly situated. The Illinois Bell Telephone Company is joined as a defendant in this count. Count III is brought not only on behalf of all IBT subscribers, but also on behalf of IBT. Presently pending before this Court are cross-motions for summary judgment on Count I, IBT's motions for summary judgment on Counts II and III, and the Government's motions to dismiss Count II and Count III. While Counts II and III raise jurisdictional and procedural questions, the ultimate substantive issue in all counts, the propriety of the challenged federal tax on telephone service, is the same. We turn now to the cross-motions for summary judgment on Count I. "(S)ummary judgment is appropriate where, as

here, there are no material factual issues in dispute and only legal issues need be resolved. *Chicago Joint Board v. Chicago Tribune Co.*, 307 F. Supp. 422, 424 (N. D. Ill. 1969).

The Government, under 26 U. S. C. § 4251(a), imposes a communications excise tax on persons who pay for local and toll telephone service. Local and toll telephone service is defined in the following section, 26 U. S. C. § 4253(a, b). Telephone companies, such as IBT, are required to collect the federal communications tax imposed on their subscribers under Section 4251. 26 U. S. C. § 4291.

The State of Illinois also imposes taxes on telephone companies engaged in transmitting messages. Ill. Rev. Stats. Ch. 120, § 467.2 (1969). The companies are authorized to pass a portion of that tax on to their subscribers or customers. Ill. Rev. Stats. Ch. 111⅔, § 36(b). Similarly, some local municipalities impose a tax on telephone companies. Ill. Rev. Stats. Ch. 24, § 8-11-2 (1969), which charge may also be passed on to customers. Ill. Rev. Stats. Ch. 111⅔, § 36(b) (1969).

On its bills to its customers, the IBT separately lists the amount due on account of state and local taxes. See Complaint, Ex. 2 to Ex. 1. The Government, through the IBT as its collector or conduit, has been collecting its communications services tax, currently at the rate of 10%, on the total of the charges set forth for both telephone service and state and local taxes. For instance, one IBT bill sent to plaintiff provided in part:

		Due to Taxes*	U. S. Tax	
Telephone Service	17.50	.59	1.81	19.90

* City and state taxes.

The narrow substantive issue before the Court is whether the federal communications tax is properly imposed. Plain-

tiff claims that the amount on his bill "due to taxes" is not an amount paid "for communications services," pursuant to 26 U. S. C. § 4251(a), that, basically, he is being taxed on a tax, and that, consequently, the amounts attributable to state and local taxes should be excluded from consideration when the federal excise tax is calculated. Essentially, the Government's position is that the various state and municipal taxes are imposed on the telephone companies and not on telephone customers, that these items are just like other operating expenses, and that they may be passed on to the customers as a charge for communications services.

The federal excise tax is imposed on "amounts paid for the following communication services . . .:

> Local telephone service.
> Toll telephone service.
> . . . ."

26 U. S. C. § 4251(a)(1). Both parties agree that the terms local and toll telephone service are to be given "their commonly accepted and understood meaning—the right to use a telephone which is part of a telephone system and to communicate thereby with other persons having telephones which are part of this system." Now 26 U. S. C. § 4254(2) provides that "(i)f a bill is rendered the taxpayer for local telephone service or toll telephone service—

> (1) the amount on which the tax with respect to such services shall be based shall be the sum of all charges for such services included in the bill . . ."

Again, plaintiff claims that the federal tax is on the cost of telephone services only and not on local or state taxes on those services. The Government suggests that the challenged amounts are another kind of charge for such services which charge may be used as a basis for calculating the federal tax due.

A key to this puzzle can be found in the construction of the Illinois statutes which concern telephone taxes. As noted previously, "persons engaged in the business of transmitting messages in" Illinois, e.g., telephone companies, are assessed a "gross receipts" tax. Ill. Rev. Stats. Ch. 120, § 467.2 (1969), which tax may be passed on to their customers, Ill. Rev. Stats. Ch. 111⅔, § 36(b) (1969). Confronted with interpreting parallel statutory provisions which ostensibly taxed public utilities such as electric companies and permitted them to pass the charges on to their customers, the Illinois Supreme Court said in *East St. Louis* v. *Union Electric Co.*, 37 Ill. 2d 537, 542-43 (1967):

> "On a literal and superficial view it might appear as if the utility tax ordinance imposed a tax burden upon the Company, but on examination it is evident that the burden was placed on the consumers. The Company, as authorized, simply passed on the new charges to its customers and the consumers not only paid such charges to the City but also paid the Company the expenses it incurred while serving as a collector or conduit of taxes from the consumers to the City."

Essentially, then, the Illinois Supreme Court found that the statutory assessments were tantamount to or functionally equivalent to direct taxes on the consumers because the consumers were authorized to be charged, were charged, and, in fact, paid the amount due, plus an extra portion to cover the cost of collection. Significantly, the companies absorbed no collection costs. *Id.*

The state and local telephone tax system is indistinguishable from the utilities tax system construed in the *East St. Louis* case. Based on that case, there is no doubt that Illinois does not consider those amounts on the telephone bill due to state and local taxes to be levies on the company, but, rather, charges on the telephone subscriber. Under this construction, the amounts are not charges for local or toll

telephone service under federal law. Consequently, they ought not be considered in that basis from which the federal telephone excise tax is figured.

Both sides make numerous references to former and current tax regulations which purport to clarify the language of the internal revenue statutes. We are frank to say those regulations basically are wordy exercises in circular reasoning which, in the final analysis, add little or nothing to an understanding of the problem before this Court.

We find, then, that the amount on plaintiff's telephone bill which is separately listed as due to taxes is not a charge for telephone service, but rather, an assessment which is based on the telephone company's charge for service. Moreover, this assessment is, in reality, levied against the telephone subscriber or consumer. Thus, the federal telephone excise tax may not be based, to any extent, on this amount. Summary judgment on Count I of the Complaint is granted to plaintiff and denied to the Government.

ENTER:

/s/ ABRAHAM L. MARKOVITZ,
Judge.

Dated: this 16th day of October, 1970.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—69-C-1972) * *

MEMORANDUM OPINION.

Cross-Motions for Summary Judgment.

This is an action for the refund of certain federal excise taxes on telephone service. The Complaint consists of three counts. Count I was brought by Robert C. Agron, a subscriber to the telephone services of the Illinois Bell Telephone Company (IBT), against the United States, and challenged the legality of the assessment of federal telephone excise taxes on that portion of a subscriber's telephone bill which is attributable to state and local taxes. On October 16, 1970, this Court granted summary judgment to plaintiff and against the Government, holding that assessments due to state and local taxes could not be considered in that basis from which the federal telephone excise tax was calculated. Count II of the Complaint is brought as a class action by plaintiff on behalf of all telephone subscribers similarly situated. IBT is joined as a defendant in this count. Count III is brought not only on behalf of all IBT subscribers but also on behalf of IBT. Presently before the Court are the Government's motion to dismiss Counts II and III, IBT's motion for summary judgment on Counts II and III, and plaintiff's motion for a class action determination and for summary judgment on Counts II and III.

While extensive and involved briefs have been submitted by all parties, the complete, if short, answer to the basic

issue raised in Count II is that plaintiff's class action for tax refunds may not be maintained. An action for the refund of federal taxes may only be commenced after an administrative claim has been filed and disallowed. 26 U. S. C. § 7422(a); *United States* v. *Wells Fargo Bank*, 393 F. 2d 272, 273 (9th Cir. 1968); *Mulcahy* v. *United States*, 388 F. 2d 300, 302 (5th Cir. 1968); *England* v. *United States*, 261 F. 2d 455, 456 (7th Cir. 1958). Plaintiff has not alleged that any, much less all, of the tens of thousands of claimants on whose behalf he allegedly brings this action have exhausted their available administrative remedies. Plaintiff does allege that he filed an administrative tax refund claim on behalf of himself and all telephone subscribers similarly situated and that said claim was rejected. Complaint ¶ 23, Ex. 4. We find that attempt at satisfying the administrative prerequisites to this kind of civil suit to be unsatisfactory. By failing to name the claimants and the amounts due to each, plaintiff's claim on their behalf falls far short of the detail required by federal regulations. 26 C. F. R. § 301.6402-2. See *Herrington* v. *United States*, 416 F. 2d 1029, 1031-32 (10th Cir. 1969).

Essentially, an unauthorized agent may not "claim an unspecified refund for unknown principals." *Harkins* v. *United States*, 66-2 U. S. T. C. ¶ 9543, at 86,702 (E. D. Okla. 1966), aff'd. on other grounds; 375 F. 2d 239 (10th Cir. 1967). Consequently, the only party of whom we are aware that has standing to bring this action under 26 U. S. C. § 1346(a)(1), is the named plaintiff, Agron, who, at best, may be said to constitute a class of one. *McConnell* v. *United States*, 295 F. Supp. 605, 606 (E. D. Tenn. 1969); *Lipset* v. *United States*, 37 F. R. D. 549, 551-52 (S. D. N. Y. 1965), aff'd. 359 F. 2d 956 (2d Cir. 1966).

Once the class aspects of Count II are disregarded, the only difference between it and Count I is that IBT is named

as a party defendant. IBT was allegedly joined as a party defendant under Rule 19, F. R. Civ. P., because it was needed for a just adjudication. Complaint, ¶ 20. The Government persuasively contends that the attempted joinder of a private litigant in a tax refund action is improper. See 26 U. S. C. § 1346(a)(1); 28 U. S. C. § 7422(f); *Lazier* v. *United States*, 77 F. Supp. 241, 243 (D. N. D. 1948); *DeVan* v. *United States*, 50 F. Supp. 992, 995 (D. N. J. 1943); see also, *United States* v. *Sherwood*, 312 U. S. 584, 588 (1941); *Berkeley* v. *United States*, 276 F. 2d 9, 12 (Ct. Cl. 1960).

Since the relief to which plaintiff is entitled may occur without the involvement of IBT, the company is obviously not necessary in order to achieve a just adjudication. In view of this fact and the rules dealing with the relevant joinder in question, IBT ought to be and is hereby dismissed as a party defendant in Count II.

Summarizing, this Court finds that the only party entitled to bring this action is the named plaintiff, Agron, and that summary judgment is granted to both defendants and denied to plaintiff as to Count II.

Count III is in the nature of a class derivative action brought on behalf of IBT, plaintiff's theory being that IBT breached its fiduciary duty to the class to prevent its subscribers from being overcharged. Much of what has already been stated with respect to propriety of Count II applies here as well. In addition, since the challenged federal tax, 26 U. S. C. § 4251, is imposed on telephone customers, not companies, IBT had no claim to press against the Government. It was not the person assessed, nor was it the authorized agent of such a person, 26 C. F. R. § 301. 6402-2(e). Neither was IBT eligible to pursue a claim under 26 U. S. C. § 6415(a) which permits tax collectors to obtain credits or refunds under certain circumstances not alleged to be pres-

ent in the instant action. The obligation which IBT was bound to perform was not litigation on behalf of its subscribers, but the collection and holding of certain tax revenues according to federal statutes, 26 U. S. C. §§ 4291, 7501(a), and policy. In short, IBT has no corporate claim to press, so there are no shoes in which plaintiff can stand. See *Agron* v. *Illinois Bell Telephone Co.*, 67 C 2041 (N. D. Ill. Aug. 4, 1969), per Napoli, *J.* Defendants are entitled to summary judgment on Count III.

ENTER:

/s/ ABRAHAM L. MAROVITZ,
Judge.

Dated: this 11th day of December, 1970.

APPENDIX D.

Internal Revenue Code of 1954 (26 U. S. C.):

SEC. 4251. IMPOSITION OF TAX.

(a) *In General.* —

(1) Except as provided in subsection (b), there is hereby imposed on amounts paid for the following communication services a tax equal to the percent of the amount so paid specified in paragraph (2):

Local telephone service.
Toll telephone service.
Teletypewriter exchange service.

The taxes imposed by this section shall be paid by the person paying for the services.

* * * * * *

SEC. 4252. DEFINITIONS.

(a) *Local Telephone Service.*—For purposes of this subchapter, the term "local telephone service" means—

(1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system, and

(2) any facility or service provided in connection with a service described in paragraph (1).

The term "local telephone service" does not include any service which is a "toll telephone service" or a "private communication service" as defined in subsections (b) and (d).

(b) *Toll Telephone Service.*—For purposes of this subchapter, the term "toll telephone service" means—

(1) a telephonic quality communication for which (A) there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication and (B) the charge is paid within the United States, and

(2) a service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.

* * * * * *

SEC. 4254. COMPUTATION OF TAX.

(a) *General Rule.*—If a bill is rendered the taxpayer for local telephone service or toll telephone service—

(1) the amount on which the tax with respect to such services shall be based shall be the sum of all charges for such services included in the bill; except that

(2) if the person who renders the bill groups individual items for purposes of rendering the bill and computing the tax, then (A) the amount on which the tax with respect to each such group shall be based shall be the sum of all items within that group, and (B) the tax on the remaining items not included in any such group shall be based on the charge for each item separately.

(b) *Where Payment Is Made for Toll Telephone Service in Coin-Operated Telephones.*—If the tax imposed by section 4251 with respect to toll telephone service is paid by inserting coins in coin-operated telephones, tax shall be computed to the nearest multiple of 5 cents, except that, where the tax is midway between multiples of 5 cents, the next higher multiple shall apply.

PREAMBLE TO ORDINANCE OF CITY OF CHICAGO APPROVED DECEMBER 4, 1967, AMENDING MUNICIPAL CODE § 132-31.

"WHEREAS, The General Assembly of the State of Illinois has authorized the corporate authorities of any municipality to impose a tax upon persons engaged in the business of transmitting messages by means of electricity at a rate not to exceed five per cent of the gross receipts from such business originating within the corporate limits of the municipality; and

"WHEREAS, The General Assembly has indicated that such utility may charge its customers an amount equal to such municipal tax; and

"WHEREAS, The Supreme Court of the State of Illinois in the City of East St. Louis vs. Union Electric Company (September 27, 1967) 37 Ill. 2d 532, held that the utility tax in substance was not a tax upon the utility company but rather a tax upon the customers who ultimately pay the tax; and

"WHEREAS, A tax upon those persons engaged in the business of transmitting messages by means of electricity has been imposed at the rate of two per cent of the gross receipts from such business, which tax has been passed on to their customers; and

"WHEREAS, It is the intention of the City Council of the City of Chicago that the increase in this rate hereinafter proposed in this ordinance shall likewise be passed on to the customers of those businesses engaged in transmitting messages by means of electricity; now, therefore."

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
JAN 31 1972
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NOS. 71-777 AND 71-807

NO. 71-777

ROBERT E. CLEVELAND and FRANCES H. CLEVELAND, etc.,
Petitioners,

v.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois Corporation, and UNITED STATES OF AMERICA,
Respondents.

NO. 71-807

ROBERT C. AGRON,
Petitioner,

v.

ILLINOIS BELL TELEPHONE COMPANY, et al.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NOS. 71-777 AND 71-807

NO. 71-777

ROBERT E. CLEVELAND and
FRANCES H. CLEVELAND, etc.,
Petitioners,

v.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois Corporation, and UNITED STATES OF AMERICA,
Respondents.

NO. 71-807

ROBERT C. AGRON,
Petitioner,

v.

ILLINOIS BELL TELEPHONE COMPANY, et al.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION

Illinois Bell Telephone Company (Illinois Bell) opposes granting the writs of certiorari in Nos. 71-777 and 71-807 and for its reasons respectfully states:

STATUTES INVOLVED

In addition to the statutes referred to by petitioners, the following Illinois statutes and Internal Revenue Service rulings are involved: Section 8-11-2 of the Illinois Municipal Code (24 Ill. Rev. Stat. (1969) §8-11-2), Sections 467.1 and 467.2 of the Illinois Messages Tax (120 Ill. Rev. Stat. (1969) §§467.1-467.2), Section 36(a) and (b) of the Illinois Public Utilities Act (111⅔ Ill. Rev. Stat. (1969) §36(a), (b)), and Internal Revenue Service Rulings dated August 2, 1948, March 15, 1968, and March 31, 1969. These statutes and rulings are set out in the Appendix hereto.

STATEMENT

These petitions arise from a unanimous and well-reasoned decision of the United States Court of Appeals for the Seventh Circuit holding that the federal communications excise tax was "properly computed" (A. 5a)[1] and that the petitioners were not entitled to refunds. In No. 71-807, a challenge to the method of computing the federal tax was initiated by petitioner Robert C. Agron (Agron) who sought a refund of federal taxes allegedly overcollected from him by respondents. Agron's theory was that the federal tax on Illinois Bell's customers was overcollected to the extent that the base for taxation included amounts that customers paid under supplemental schedules filed by Illinois Bell with the Illinois Commerce Commission to recover the expenses of certain municipal occupation taxes and of part of the state Messages Tax imposed upon Illinois

[1] The Appendix to the *Agron* petition (No. 71-807) will be referred to herein as "A..." Illinois Bell's opposition to the *Cleveland* petition (No. 71-777) is treated separately beginning at p. 16, *infra*. Since the issues in *Agron* and *Cleveland* are essentially similar, much of the following statement is relevant to both cases. The Court of Appeals issued a single opinion.

Bell. The Court of Appeals, after considering the Illinois statutes and decisions involved, concluded that the state and local taxes are imposed upon Illinois Bell, not upon its customers (A. 6a-9a). Since Illinois Bell's charges to its customers to recover the expenses resulting from those taxes are made pursuant to schedules filed with the Illinois Commerce Commission (A. 13a), the Court of Appeals held that the computation and collection of "the tax imposed by section 4251 of the Internal Revenue Code does not result in any overassessment of the federal tax and . . . the district court erred in granting a tax refund to Agron" (A. 16a).

Having concluded that the federal tax was properly assessed, the Court of Appeals found it unnecessary to consider the other issues raised by Agron. These dealt with the district court's decision dismissing Counts II and III of Agron's complaint for want of jurisdiction. In Count II, Agron sought a refund from the United States on behalf of all Illinois Bell customers similarly situated on the basis of the same alleged overassessment. Illinois Bell was named as a party allegedly necessary for class relief. The district court held that Agron's "class action for tax refunds may not be maintained" because all members of the class did not file refund claims (A. 24a), that the "attempted joinder of a private litigant in a tax refund action is improper" (A. 25a) and that "since the relief to which plaintiff is entitled may occur without the involvement of IBT," Illinois Bell is "obviously not necessary in order to achieve a just adjudication" (*id.*). In Count III, Agron sought relief on behalf of members of the same class on the theory that they could file a derivative action on behalf of Illinois Bell against the United States. The district court denied the class relief and held that Illinois Bell "had no claim to press against the Government" since the federal tax "is imposed on telephone customers" not upon Illinois Bell (A. 25a) and since the obligation of Illinois Bell is "the collec-

tion and holding of certain tax revenues according to federal statutes, 26 U.S.C. §§4291, 7501(a) and policy" (A. 26a).

In challenging the propriety of the assessment and collection of the federal tax, Agron treats in a most summary and misleading fashion the terms of the federal statute and the Illinois statutes and court decisions relied upon by the Court of Appeals.

Under Illinois law, Illinois Bell is required to set forth all rates or charges for intrastate telephone service in schedules filed with the Illinois Commerce Commission (111⅔ Ill. Rev. Stat. (1969) §§ 36, 37). The schedules filed by Illinois Bell setting forth rates for telephone service are designed to recover all of the costs incurred by Illinois Bell in providing telephone service within Illinois, and a fair return on investment. *Illinois Bell Telephone Co.* v. *Illinois Commerce Commission,* 414 Ill. 275, 286, 111 N.E. 2d 329, 335 (1953).

It is an elementary principle of public utility rate regulation that taxes imposed upon a public utility are one of the expenses normally considered in determining the proper level of rates to be charged by that utility. As this Court has pointed out, "a proper allowance for taxes" is "normally included as a cost of service" in determining rates. *FPC* v. *United Gas Pipe Line Co.,* 386 U.S. 237, 243 (1967). Similarly, in Illinois Commerce Commission rate proceedings, various municipal, state and federal taxes imposed upon a telephone company are among the expenses included in determining the rates to be charged by that company. *E.g., Illinois Bell Telephone Company Proposed Advance in Rates,* 32 Ill. Comm. Comm'n. 149, 154-155 (1953). Since taxes imposed upon Illinois Bell are expenses for rate-making purposes just as are the costs of labor, materials and capital, the economic burden of all such taxes

is ultimately borne by Illinois Bell's customers through the rates charged for telephone service (A. 7a, 12a).

Among the various taxes imposed upon Illinois Bell which are recovered through the rates Illinois Bell charges its customers are municipal occupation taxes and the state Messages Tax. In 1955, Illinois enacted provisions authorizing municipalities to impose an occupation tax upon "persons engaged in the business of transmitting messages" (24 Ill. Rev. Stat. (1969) § 8-11-2). The tax is not to exceed 5 percent of the gross utility receipts from business originating within the municipality imposing the tax (*id.*). At the present time, many Illinois municipalities, including Chicago, have elected to impose an occupation tax upon Illinois Bell (A. 2a). In 1965, Illinois increased the state Messages Tax, which is measured by a telephone company's gross receipts, from 3 percent to 4 percent, and in 1967, from 4 percent to 5 percent (120 Ill. Rev. Stat. (1969) § 467.1 *et seq.*). Like the municipal occupation taxes authorized by the state, the Act imposing this state gross receipts tax makes it clear that the "taxpayer" is a "person engaged in the business of transmitting messages" (120 Ill. Rev. Stat. (1969) §467.1). (A. 2a, 6a)[2]

[2] The Illinois Department of Revenue has ruled that both the municipal occupation taxes and the state Messages Tax are imposed upon Illinois Bell and not upon its customers. The Department has stated that the municipal taxes are "occupation taxes whose legal incidence fall on . . . the person engaged in the business of transmitting messages. . . . They are not taxes which are levied on the customer . . ." (Bulletin accompanying March 14, 1956, amended Article 10 of Illinois Messages Tax Regulations). The Department has stated that the state Messages Tax "is imposed upon persons engaged in the business of transmitting messages in this State . . . and is not imposed upon persons for whom services within the Act are rendered by such taxpayers . . ." (Article 10b of Illinois Messages Tax Regulations).

Since these two gross receipts taxes imposed upon public utilities directly increase the costs of operation of the utilities, Illinois adopted a procedure to permit utilities expeditiously to recover the expenses resulting from the imposition upon them of these taxes. Instead of requiring Illinois Bell and other utilities to initiate a general rate proceeding to recover the additional expenses resulting from the enactment of the municipal taxes and the increase in the state Messages Tax above 3 percent, the Illinois statutes provide that utilities may file supplemental schedules to recover the expenses resulting from the imposition of these taxes and that such schedules may not be suspended pending Illinois Commerce Commission review (111⅔ Ill. Rev. Stat. (1969) § 36(a), (b)).

Paragraph (a) of Section 36 of the Illinois Public Utilities Act, which was added at the time municipalities were authorized to impose occupation taxes, applies "whenever a municipality pursuant to Section 8-11-2 [of the Municipal Code] . . . imposes a tax on any public utility. . . ." Under the procedures established in paragraph (a), a public utility "may charge its customers" to recover such municipal occupation tax expenses by filing "with the Commission a supplemental schedule applicable to such municipality which shall specify such additional charge." Paragraph (b) was added to Section 36 when Illinois raised the Messages Tax rate above 3 percent. Like paragraph (a), paragraph (b) permits a telephone company to recover the expense resulting from any increase above 3 percent in the Messages Tax by filing a supplemental schedule which sets forth an additional charge to its customers equal to the amount of the increase and such schedules may not be suspended pending Commission review (A. 3a, 4a).

In contrast to the municipal occupation taxes and the state Messages Tax which are imposed upon Illinois Bell,

the federal communications excise tax is imposed upon the customers of telephone companies. Section 4251 of the Internal Revenue Code provides that the excise tax "shall be paid by the person paying for the services" (26 U.S.C. § 4251(a)(1)). While the federal tax has been in effect, and until it is phased out pursuant to a recent act of Congress,[3] Illinois Bell is required to collect the federal excise tax which is imposed upon its customers, and in so doing, acts in a purely ministerial capacity pursuant to directions of the Internal Revenue Service (26 U.S.C. § 4291; see I.R.S. rulings in Appendix, *infra*). Illinois Bell is required to hold the federal taxes paid by and collected from its customers as "a special fund in trust for the United States" (26 U.S.C. § 7501(a)), and it pays over the amounts so collected each month to the Internal Revenue Service (26 C.F.R. § 49.6302(c)-1).

The federal tax applies to "all charges" paid by Illinois Bell customers for access to several types of service, including "local telephone service" and "toll telephone service" (26 U.S.C. § 4254(a)(1)). "Local telephone service" is defined in the Code as "the access to a local telephone system, and the privilege of telephonic quality communication. . . " (26 U.S.C. § 4252(a)(1)). The question of what a telephone customer must pay to obtain access to the telephone system is a matter of state law. As a public utility, Illinois Bell has a duty under Illinois law not to "charge, demand, collect or receive a greater or less or different compensation . . . for any service rendered or to be rendered, than the rates or other charges applicable to such . . . service as

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[3] On December 31, 1970, Section 4251 was amended to provide for the complete elimination of the federal communications excise tax in a series of steps (P.L. 91-614). The rate of tax will remain 10% until January 1, 1973, at which time it will decrease 1% each year until January 1, 1982, after which the tax will not be imposed.

specified in its schedules on file and in effect at the time . . ." (111⅔ Ill. Rev. Stat. (1969) §§ 37, 39). Thus Illinois law provides that no Illinois Bell customer may have access to the telephone system unless he pays all charges pursuant to schedules filed by Illinois Bell with the Illinois Commerce Commission, including supplemental schedules filed with that Commission to recover the expenses of municipal occupation taxes and of part of the state Messages Tax imposed upon Illinois Bell. Since these municipal and state taxes imposed on Illinois Bell are expenses to be recovered through charges to its customers under schedules and supplemental schedules approved by the Illinois Commerce Commission, and since Illinois Bell customers must pay these charges to have access to the telephone system under the Illinois Public Utilities Act, the Court of Appeals has held that such charges are amounts paid for telephone service as defined in the Internal Revenue Code (26 U.S.C. §4252(a)(1)).[4]

THERE IS NO REASON FOR GRANTING THE WRIT IN NO. 71-807

1. The Court of Appeals unanimously and correctly concluded that the municipal occupation taxes and the state Messages Tax are imposed upon Illinois Bell, not upon its customers, and that charges to customers to recover ex-

[4] Illinois Bell had no discretion in including the amounts charged under supplemental schedules in the base upon which the federal communications excise tax is computed. This assessment was required by three directives of the Internal Revenue Service, dated August 2, 1948, March 15, 1968, and March 31, 1969, all of which are set forth in the Appendix hereto. Agron's assertion that "the IRS fashioned its special 1969 tax ruling for this case long after this litigation had begun in 1967" (Petition, p. 10), is simply untrue, since the 1969 ruling merely reaffirmed the principles set forth by the Internal Revenue Service in its ruling issued in 1948—over 20 years earlier.

penses incurred by Illinois Bell due to those taxes are charges for communications service (A. 12a). Thus, the court held these charges to be properly includable in the base upon which the federal communications excise tax is assessed. The court resolved the controlling question of state law—the nature of the charges made by Illinois Bell to recover the expenses of the state and local taxes imposed upon it—by applying relevant Illinois statutes and court rulings (A. 6a-9a).[5]

Agron's contention that "the court below never really considered" (Petition, p. 5) whether the charges of Illinois Bell to recover the expenses of the state and local taxes imposed upon it are charges for communications services within the federal statute cannot be reconciled with the Court of Appeals' decision, which considered and decided precisely that question (A. 12a, 13a-14a, 15a). After reviewing the "clear language of the Illinois statutes" and decisions of "the Illinois courts" showing that the state and local taxes are imposed upon Illinois Bell (A. 6a-7a), the Court of Appeals held that "amounts paid to reimburse IBT for its payment of the state and local messages taxes—just as amounts paid to reimburse IBT for all other taxes and for labor costs and equipment repairs—are paid for telephone service within the meaning of the [federal communications excise tax] statute" (A. 12a; see also A. 15a). Moreover, the court's holding that Illinois Bell's charges were properly includable in the federal tax base was unaffected by the separate statement of those charges by Illinois Bell on its customers' bills, since "neither IBT nor . . . Illinois can defeat that result by providing for the

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[5] The Court of Appeals' decision is also completely consonant with subsequent decisions of the Illinois Supreme Court concerning the incidence and computation of taxes: See *Martin Oil Service, Inc.* v. *Department of Revenue*, 49 Ill. 2d 260, 273 N.E.2d 823 (1971).

itemization of those amounts passed on to customers which are attributable to taxes on IBT" (A. 14a).

There is no conflict between the decision of the Court of Appeals and any other decision construing the federal communications excise tax, the only federal statute at issue here. Further, the decision amply confirms a consistent series of Internal Revenue Service rulings dating back 20 years (see Appendix hereto). For these reasons, there is no merit whatever in Agron's attempt to have this Court review the judgment of the Court of Appeals.

2. In view of its dispositive holding that the computation and collection of "the tax imposed by section 4251 of the Internal Revenue Code does not result in any overassessment of the federal tax" (A. 16a), the Court of Appeals stated "we intimate no opinion on the correctness of the district court's dismissal of Counts II and III" (*id.*). However, the district court was clearly correct in holding that Agron's class action for a tax refund could not be maintained, that Illinois Bell could not be joined with the Government in a tax refund action and that Illinois Bell was not a necessary party to accord Agron any relief to which he might be entitled.

In an effort to invoke this Court's discretionary jurisdiction, Agron erroneously asserts that the question of whether a class action for a tax refund can be maintained, where, as here, each member of the purported class has not filed a claim for a refund, "has given difficulty to lower federal courts" (Petition, p. 13). Section 7422(a) of the Internal Revenue Code is unequivocal in its requirements concerning the filing of refund claims (26 U.S.C. §7422(a)):

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for a refund or credit has been duly filed with the Secretary . . . according to the provisions of law . . . and the regulations of the Secretary. . . ."

Moreover, every court which has considered this provision has ruled, as the district court did here, that a class action for a tax refund cannot be maintained on behalf of a purported class member who has not filed a properly documented refund claim.

The courts have uniformly held that each member of a class suing for a refund of federal taxes must have filed a proper claim for a refund in order for the suit to be maintained. For example, *Harkins* v. *United States*, 66-2 U.S.T.C. ¶9543 at 86,701 (E.D. Okla. 1966), *aff'd. on other grounds*, 375 F.2d 239 (10th Cir. 1967), involved a class action for a tax refund filed on behalf of the named plaintiffs, a husband and wife, "and for all those members of the Five Civilized Tribes similarly situated" to recover taxes on allegedly non-taxable income (*id.*, at 86,702). The plaintiff there contended that "all of the unnamed plaintiffs . . . and the amounts of refund due them are identifiable in the Internal Revenue Service files . . . and to require them to file individual claims for refund would be to unjustly enrich defendant at their expense . . ." (*id.*). The court granted the Government's motion to dismiss on the ground, among others, that "suit was filed without a proper claim for refund having been filed. The Treasury Regulations do not permit an unauthorized agent to claim an unspecified refund for unknown principals" (*id.*).

Similarly, in *McConnell* v. *United States*, 295 F. Supp. 605 (E.D. Tenn. 1969), the court refused to permit the named plaintiffs, a husband and wife, to maintain a tax refund action on behalf of the class of the striking employees of a company and their spouses. The members of the purported class had not filed claims for refunds. The court ruled that "before any taxpayer may maintain any action to recover any internal revenue tax . . . it is an absolute and indispensable prerequisite that such taxpayer shall have filed a claim for refund . . ." (*id.*, at 606).

This Court's decision in *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951), lends no support to Agron's contention that "even if Rule 23 could be construed as an extension of the jurisdiction of the court [over tax refund actions]—which it is not—this authority was plainly granted by Congress in 28 U.S.C. §1346(a)(1)" (Petition, p. 17). *Yellow Cab* involved tort claims, jurisdiction over which is exclusively in the district courts under Section 1346(b). In contrast, the jurisdiction over actions seeking refunds of federal taxes is governed by Section 1346(a)(1) of the Judicial Code (28 U.S.C. §1346(a)(1)). That section establishes jurisdiction which is to be "concurrent with the Court of Claims" in "any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected" (*id.*).

In *United States* v. *Sherwood*, 312 U.S. 584 (1941), this Court considered the scope of concurrent jurisdiction such as that granted in Section 1346(a) to the district courts and the Court of Claims over certain actions, including those for a tax refund, brought against the United States.[6] Since the jurisdiction of the Court of Claims "is confined to the rendition of money judgments in suits brought for that relief against the United States," this Court concluded that "if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court . . ." (*id.*, at 588).[7] Moreover, this Court

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[6] The action was brought pursuant to 28 U.S.C. §41(20). That section was reenacted in substantially identical form as 28 U.S.C. §1346(a)(2), which in turn confers concurrent jurisdiction in a form identical to that conferred by 28 U.S.C. §1346(a)(1).

[7] The Court in *Yellow Cab* noted that the scope of the jurisdiction granted by the Tort Claims Act is quite different from and "substantially broadens the jurisdiction of the District Courts as compared to that provided by the Tucker Act" which was involved in *Sherwood* (340 U.S. at 552).

specifically rejected an argument that the Rules of Civil Procedure expanded the limited and strictly defined jurisdiction of actions against the United States where the jurisdiction of the district court is concurrent with the Court of Claims (*id.*, at 591):

> "The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. The jurisdiction thus limited is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction."

In these circumstances, it is clear that the district court correctly held that Rule 23 does not avoid the jurisdictional prerequisite to maintaining a tax refund action that each individual seeking such a refund must have filed a claim for a refund before instituting suit. Agron's contention that this prerequisite is unnecessary "where, as here, there is involved only an issue of law and there is nothing of an administrative nature to be done" (Petition, p. 18) is plainly incorrect. As the court pointed out in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 567 (2d Cir. 1968), judicial intervention is only appropriate in situations where there is "no public administrative body that could ensure repayment, so the responsibility must ultimately rest on the judicial system." However, here the Internal Revenue Code has established a procedure for passing upon claims for refunds of federal taxes and hence judicial intervention in

the absence of filing such claims is both unnecessary and inappropriate.[8]

3. Agron asserts that he "does not argue . . . but reserves" (Petition, p. 3) the issues respecting the district court's rulings that the "attempted joinder of a private litigant [Illinois Bell] in a tax refund action is improper" and that the joinder of Illinois Bell "is obviously not necessary . . . to achieve a just adjudication" (A. 25a). Even if this Court were to consider whether to review these issues, such review would not be warranted because the district court's decision dismissing Illinois Bell as a party was plainly correct. This Court's decision in *United States* v. *Sherwood, supra*, establishes that the joinder of a private litigant with the United States in actions for the recovery of money from the United States is improper where, as in tax refund actions, there is concurrent jurisdiction between the district courts and the Court of Claims.[9]

In asserting that Illinois Bell's joinder "was necessary and proper" (Petition, p. 3), Agron sets forth a series of assertions concerning Illinois Bell's record keeping and retention procedures which have no support whatever in the record. Basically, Agron argues that Illinois Bell is a necessary party because "administratively a refund will be

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[8] Agron's reliance upon *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (5th Cir. 1968), to support his contention that "the exhaustion doctrine has been satisfied" (Petition, p. 18) is misplaced. That case involved discriminatory employment practices and a complaint brought under Title VII of the Civil Rights Act, establishing an administrative agency which can only endeavor to effect voluntary conciliations and has no power to award damages or to grant injunctive relief (42 U.S.C. §2000(e) *et seq.*).

[9] The rule enunciated in *Sherwood* has been followed in tax refund actions and required that Illinois Bell be dismissed as a defendant in the district court. See, *e.g.*, *De Van* v. *United States*, 50 F. Supp. 992 (D.N.J. 1943).

most feasible if carried out through IBT" (*id.*, at 4). As is shown in the detailed affidavit of Mr. R. H. Phelps submitted by Illinois Bell in the district court, however, Illinois Bell does not maintain records of the amounts that would be due under Agron's theory from the United States as a refund to each Illinois Bell customer. That affidavit also shows that although Illinois Bell does maintain records from which the amounts of disputed federal tax could be approximately calculated by subscriber for the most recent six-month period, the cost to Illinois Bell of such an undertaking would far exceed the gross amount of the disputed federal tax for that period (Phelps Aff., pp. 61-62[10]). And for any period beyond the most recent six months, Illinois Bell only retains summary records which would be of no use whatever in the determination of individual refunds (*id.*, at 53-56).

Agron has never offered any evidence disputing these facts. Moreover, there is no showing that other Illinois Bell customers cannot pursue the administrative machinery established by the Internal Revenue Service for passing upon refund claims. Contrary to Agron's assertion, those of Illinois Bell's customers who are interested in claiming a refund are, like Agron, in a better position than Illinois Bell to determine the amount of such a refund. Thus, there is no basis for abandoning the established administrative refund machinery of the Internal Revenue Service and substituting in its place an extra-statutory refund process supervised by the judiciary. The district court's decision that there is no basis for involving Illinois Bell in this dispute between Agron and the Government would not warrant review even if this Court were to decide to review the Court of Appeals'

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[10] Page references to Mr. Phelps' affidavit are to the Joint Appendix in the Court of Appeals.

decision on the propriety of the assessment of the federal communications excise tax.[11]

THERE IS NO REASON FOR GRANTING THE WRIT IN NO. 71-777

The Court of Appeals correctly affirmed the district court's decision dismissing the complaint of Robert E. and Frances H. Cleveland (Cleveland) (No. 71-777). Like the complaint in *Agron,* Cleveland erroneously alleged "that state and municipal taxes are not proper charges to be included in determining the federal tax base . . . thereby entitling plaintiffs to a refund" (A. 25a).[12] However, Cleveland did not file any claim for a refund with the Internal Revenue Service.

Cleveland's action was originally commenced against Illinois Bell alone in October, 1969, in the Circuit Court of Cook County, Illinois. Since Cleveland's state court complaint questioned the proper method of assessing the fed-

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[11] The district court correctly dismissed Count III of Agron's complaint, which was "in the nature of a class derivative action brought on behalf of IBT, plaintiff's theory being that IBT breached its fiduciary duty to the class to prevent its subscribers from being overcharged" (A. 25a). The same jurisdictional defects in Count II—improperly seeking to bring a class action for a tax refund and improper joinder—also required dismissal of Count III (*id.*). Moreover, since the federal tax is not imposed upon Illinois Bell and its role in the collection and assessment of that tax is purely ministerial, Illinois Bell "had no claim to press against the Government" (*id.*). Finally, consideration of Count III is barred by the doctrine of *res judicata,* since the same issue involved in Count III was unsuccessfully litigated by petitioner in a prior case—*Agron* v. *Illinois Bell Telephone Co., et al.* (No. 67 C 2041, N.D. Ill. Aug. 4, 1969).

[12] This reference to the Appendix and all others in the remainder of the brief are to the Appendix to the *Cleveland* petition and will be referred to as "A. . ."

eral communications excise tax and sought a refund of amounts allegedly improperly collected, Illinois Bell filed a timely petition, pursuant to 28 U.S.C. §1441, to remove the action to the United States District Court. The district court denied Cleveland's motion to remand (A. 24a-27a) and subsequently dismissed Cleveland's complaint on motion of Illinois Bell and the United States (A. 27a-29a).

The Court of Appeals held that since "IBT properly computed the federal tax in accordance with the provisions of the Internal Revenue Code, the underlying basis of the Clevelands' complaint falls" (A. 15a). While the Court of Appeals did not pass upon the other issues raised by Cleveland, the district court had properly dismissed Cleveland's complaint for failure to file any claim for a refund before instituting his action. No basis has been advanced in his petition for reviewing that judgment.

Despite the requirement of Section 7422(a) that "no suit . . . shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for a refund . . . has been duly filed . . ." (26 U.S.C. § 7422(a)), Cleveland by his own admission failed to file any claim for a refund before instituting this action. In *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U.S. 269, 272-273 (1931), this Court held that "the filing of a claim . . . as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon . . ." and also emphasized that "the necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected."

Similarly, Cleveland advances no basis for reviewing the district court's judgment denying his motion to remand this action to the state court. As the district court pointed out, "to say that this action is not brought for a refund of taxes or that the United States is not charging the tax is absurd

because, as the complaint alleged, the money was assessed pursuant to federal law regarding communication taxes, 28 U.S.C. §§ 4251-54" (A. 27a).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari to the United States Court of Appeals for the Seventh Circuit in *Agron* (No. 71-807) and *Cleveland* (No. 71-777) should be denied.

Respectfully submitted,

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January 31, 1972

APPENDIX

24 Ill. Rev. Stat. (1969) §8-11-2:

§8-11-2. *Taxation of occupations or privileges*

The corporate authorities of any municipality may tax any or all of the following occupations or privileges:

1. Persons engaged in the business of transmitting messages by means of electricity, at a rate not to exceed 5% of the gross receipts from such business originating within the corporate limits of the municipality.

2. Persons engaged in the business of distributing, supplying, furnishing, or selling gas for use or consumption within the corporate limits of the municipality, and not for resale, at a rate not to exceed 5% of the gross receipts therefrom.

3. Persons engaged in the business of distributing, supplying, furnishing, or selling electricity for use or consumption within the corporate limits of the municipality, and not for resale, at a rate not to exceed 5% of the gross receipts therefrom.

4. Persons engaged in the business of distributing, supplying, furnishing, or selling water for use or consumption within the corporate limits of the municipality, and not for resale, at a rate not to exceed 5% of the gross receipts therefrom.

None of the taxes authorized by this Section may be imposed with respect to any transaction in interstate commerce or otherwise to the extent to which such business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State or any political sub-division thereof; nor shall any persons engaged in the business of distributing, supplying, furnishing or selling gas, water or electricity, or engaged in the business of transmitting messages be subject to taxation under the provisions of this section for such transactions as are or may become subject to taxation under the provisions of

the "Municipal Retailers' Occupation Tax Act" authorized by Section 8-11-1; nor shall any tax authorized by this section be imposed upon any person engaged in a business unless such tax is imposed in like manner and at the same rate upon all persons engaged in businesses of the same class in the municipality, whether privately or municipally owned or operated.

Any of the taxes enumerated in this section may be in addition to the payment of money, or value of products or services furnished to the municipality by the taxpayer as compensation for the use of its streets, alleys, or other public places, or installation and maintenance therein, thereon or thereunder of poles, wires, pipes or other equipment used in the operation of the taxpayer's business.

For the purpose of the taxes enumerated in this section:

"Gross receipts" means the consideration received for the transmission of messages, the consideration received for distributing, supplying, furnishing or selling gas for use or consumption and not for resale, and the consideration received for distributing, supplying, furnishing or selling electricity for use or consumption and not for resale, and the consideration received for distributing, supplying, furnishing or selling water for use or consumption and not for resale, and for all services rendered in connection therewith valued in money, whether received in money or otherwise, including cash, credit, services and property of every kind and material and for all services rendered therewith, and shall be determined without any deduction on account of the cost of transmitting such messages, without any deduction on account of the cost of the service, product or commodity supplied, the cost of materials used, labor or service cost, or any other expenses whatsoever.

The words "transmitting messages", in addition to the usual and popular meaning of person to person communication, shall include the furnishing, for a consideration, of

services or facilities (whether owned or leased), or both, to persons in connection with the transmission of messages where such persons do not, in turn, receive any consideration in connection therewith, but shall not include such furnishing of services or facilities to persons for the transmission of messages to the extent that any such services or facilities for the transmission of messages are furnished for a consideration, by such persons to other persons, for the transmission of messages.

"Person" as used in this section means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint adventure, corporation, municipal corporation or political subdivision of this State, or a receiver, trustee, conservator or other representative appointed by order of any court.

Illinois Messages Tax Act, 120 Ill. Rev. Stat. (1969) §§467.1-467.2:

§467.1 *Definitions*

For the purposes of this Act:

"Gross receipts" means the consideration received for the transmission of messages and for all services rendered in connection therewith, valued in money, whether received in money or otherwise, including cash, credits, services and property of every kind or nature, and shall be determined without any deduction on account of the cost of transmitting such messages, the cost of materials used, labor or service costs or any other expense whatsoever. However, any charges added to customers' bills pursuant to the provisions of paragraph (b) of Section 36 of "An Act concerning public utilities", approved June 29, 1921, as amended, or any charges added to customers' bills by taxpayers who are not subject to rate regulation by the Illinois Commerce Commission because of the tax that is imposed by this Act on any such taxpayer, shall be excluded in determining such

gross receipts. In case credit is extended, the amount thereof shall be included only as and when payments are received.

The words, "transmitting messages," in addition to the usual and popular meaning, include the furnishing, for a consideration, of services or facilities (whether owned or leased), or both, to persons in connection with the transmission of messages where such persons do not, in turn, receive any consideration in connection therewith, but do not include such furnishing of services or facilities to persons for the transmission of messages to the extent that any such services or facilities for the transmission of messages are furnished for a consideration, by such persons to other persons, for the transmission of messages.

"Department" means the Department of Revenue of the State of Illinois.

"Director" means the Director of Revenue for the Department of Revenue of the State of Illinois.

"Taxpayer" means a person engaged in the business of transmitting messages.

"Person" means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint adventure, corporation, or a receiver, trustee, conservator or other representative appointed by order of any court, or any city, town, county or other political subdivision of this State.

§467.2 *Rate of tax—Interstate business exempt*

A tax is imposed upon persons engaged in the business of transmitting messages in this State at the rate of 5% of the gross receipts from such business, provided that any change in rate imposed by this amendatory Act of 1967 shall become effective only with bills having a date on or after August 1, 1967. However, such tax is not imposed

upon the privilege of engaging in any business in interstate commerce or otherwise to the extent to which such business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State.

111-2/3 Ill. Rev. Stat. (1969) §§36, 36(a), 36(b):

§36. *Change of rates—Notice—Suspension of rates—Temporary schedule—Charge for taxes*

* * * *

(a) Whenever a municipality pursuant to Section 8-11-2 of the Illinois Municipal Code, as heretofore and hereafter amended, imposes a tax on any public utility, such utility may charge its customers, in addition to any rate authorized by this Act, an additional charge equal to the sum of (1) an amount equal to such municipal tax, or any part thereof, (2) 3% of such tax, or any part thereof, as the case may be, to cover costs of accounting, and (3) an amount equal to the increase in taxes and other payments to governmental bodies resulting from the amount of such additional charge. Such utility shall file with the Commission a true and correct copy of the municipal ordinance imposing such tax; and also shall file with the Commission a supplemental schedule applicable to such municipality which shall specify such additional charge and which shall become effective upon filing without further notice. Such additional charge shall be made by the addition of a uniform percentage to the amounts payable for intrastate utility service in such municipality and shall be shown separately on the utility bill to each customer. The Commission shall have power to investigate whether or not such supplemental schedule correctly specifies such additional charge, but shall have no power to suspend such supplemental schedule. If the Commission finds, after a hearing, that such supplemental schedule does not correctly specify such additional charge, it shall by order require a refund to the appropriate customers of the excess, if any, with interest, in such man-

ner as it shall deem just and reasonable, and in and by such order shall require the utility to file an amended supplemental schedule corresponding to the finding and order of the Commission.

(b) Whenever the tax that is imposed upon a public utility engaged in the business of transmitting messages pursuant to Section 2 of The Messages Tax Act, or whenever the tax that is imposed upon a public utility engaged in the business of distributing, supplying, furnishing or selling gas for use or consumption pursuant to Section 2 of The Gas Revenue Tax Act, or whenever the tax that is imposed upon a public utility engaged in the business of distributing, supplying, furnishing or selling electricity for use or consumption pursuant to Section 2 of The Public Utilities Revenue Act, shall exceed the rate of 3% of the gross receipts, as defined in said Acts, respectively, from any such business, such utility may charge its customers, in addition to any rate authorized by this Act, an additional charge equal to the amount by which such tax exceeds 3%. Such utility shall file with the Commission a supplemental schedule which shall specify such additional charge and which shall become effective upon filing without further notice. Such additional charge shall be made by the addition of a uniform percentage to the amounts payable for intrastate utility service. The Commission shall have the power to investigate whether or not such supplemental schedule correctly specifies such additional charge, but shall have no power to suspend such supplemental schedule. If the Commission finds, after a hearing, that such supplemental schedule does not correctly specify such additional charge, it shall by order require a refund to the appropriate customers of the excess, if any, with interest, in such manner as it shall deem just and reasonable, and in and by such order shall require the utility to file an amended supplemental schedule corresponding to the finding and order of the Commission.

Internal Revenue Service Rulings

TREASURY DEPARTMENT
Washington 25.

Aug. 2, 1948

American Telephone and Telegraph Company
195 Broadway
New York 7, New York

Attention: Mr. Martin J. Karl

Gentlemen:

Reference is made to your letter of December 10, 1947, submitting on behalf of the Pacific Telephone and Telegraph Company and its exchange service customers in various municipalities in the State of Washington the following questions for Bureau rulings:

> "(1) Whether amounts billed to customers of telephone service in municipalities in the State of Washington which represent taxes paid to such municipalities by the company and which, pursuant to an order of the Department, are passed on to the customers on a pro rata basis, constitute amounts paid for telephone services and facilities subject to the taxes imposed by section 3465 of the Internal Revenue Code?
>
> "(2) Whether such amounts are deductible by customers for income tax purposes under section 23(c)(3) of the Internal Revenue Code and Sec. 29. 23(c)-1(b) of Regulations 111 where they are paid otherwise than in connection with the customers' trade or business?"

It is stated that the above questions arise by reason of an order issued on October 9, 1947, by the Department of Public Utilities of Washington authorizing the Pacific Telephone and Telegraph Company to bill on a pro rata

basis, to its customers in various municipalities in Washington, municipal occupation, business, excise and use of streets taxes imposed by such municipalities under the provisions of municipal ordinances.

Your letter enclosed copies of ordinances of the cities of Seattle, Spokane and Tacoma, relating to, and providing for, a license fee or tax upon certain businesses, occupations, pursuits and privileges, a copy of the Department's order describing the history of proceedings before the Department, the Superior Court of Thurston County in Washington, and the Supreme Court of the State of Washington prior to the order and setting forth the Department's findings and orders, and a photostatic copy of the portion of the Supreme Court's decision which relates to the passing on to customers, of payments to municipalities.

The evidence discloses that the taxes are levied upon the telephone company and represent payments which the company is required to make to the various municipalities in connection with its operations therein. Some of the taxes are based on gross receipts while others are specified annual and daily amounts. The taxes are universally considered proper items of operation expense, to be so considered by State rate-making authorities. The Department has the power to fix the special exchange rate applicable to the different municipalities, which will in effect require the rate payers in each municipality to absorb on a pro rata basis a sum equal to the amount of the tax the telephone company is required to pay such municipality.

Answering question No. (1), inasmuch as the payments which the telephone company must make to the various municipalities in connection with its operations therein, are considered proper items of operation expense; it is held that the pro rata shares of such payments the ratepayers are required to absorb, which are billed by the company

to its customers, constitute charges for telephone services and facilities subject to the tax imposed by section 3465 of the Code, as amended.

The answer to question No. (2) will be made the subject of a separate communication.

Very truly yours,

/s/

Commissioner.

U. S. TREASURY DEPARTMENT,
Office of Chief Counsel, Internal Revenue Service,
Washington, D. C. 23224.

Date March 15, 1968

In reply refer to:
CC:CL-3767/O:RJS

Mr. Victor E. Ferrall
General Tax Attorney
American Telephone and
Telegraph Company
195 Broadway
New York, N. Y. 10007

Re: Agron v. Illinois Bell Telephone Co.
and
American Telephone and Telegraph Company
U. S. D. C. Illinois, # 67C-2041
Your ref: C

Dear Mr. Ferrall:

This refers to your December 12, 1967 letter addressed to the Commissioner, the receipt of which has heretofore been acknowledged by this office. Attached to your cor-

respondence was a copy of a complaint filed recently in the United States District Court for Illinois against Illinois Bell Telephone Company, wherein the plaintiff, a subscriber, seeks a declaratory judgment respecting the determination of the Federal Communication Excise Tax charged and collected by that company. Also attached was a copy of a letter ruling dated August 2, 1948, which this Agency issued to American Telephone and Telegraph Company.

In response to your inquiry, you are advised that the current position of the Internal Revenue Service regarding the tax imposed by section 4251 of the Internal Revenue Code of 1954, is still represented by the aforementioned ruling, namely, that the payments which the telephone company must make to various municipalities in connection with its operations therein, are considered proper items of operation expense and therefore the pro rata shares of such payments billed by the company, which the ratepayers are required to absorb, constitute charges for telephone service subject to the Federal tax on communication services and facilities.

No decision has yet been reached with respect to the question of participation by the United States in the instant lawsuit. In this connection we acknowledge receipt of your letter of February 1, 1968, with which you forwarded a copy of the answer and third-party complaint filed in the above-entitled case. The matter is under consideration and we will let you know when any determination has been made with respect thereto.

Very truly yours,

/s/ Lester R. Uretz,
Lester R. Uretz,
Chief Counsel.

REV. RUL. 69-151,
1969-13 INTERNAL REVENUE BULLETIN 16
(March 31, 1969)

Advice has been requested whether certain amounts separately stated on customers' bills from telephone companies may be excluded in determining the amount upon which the Federal communications tax is imposed by Section 4251(a)(1) of the Internal Revenue Code of 1954. These amounts are attributable to State and local taxes (variously categorized as "gross receipts," "occupational," "message," etc., taxes) imposed on the telephone companies but passed on to the customers as separate charges.

Section 4251(a)(1) of the Code imposes a tax on certain communications services, including local telephone service. That section provides that this tax shall be paid by the person paying for the services.

Section 4252(a) of the Code provides that for purposes of the Federal communications tax the term 'local telephone service' means (1) the access to a local telephone system and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system, and (2) any facility or service provided in connection with a service described in (1).

Section 4254(a)(1) of the Code provides, with an exception not here material, that the amount on which the tax with respect to such services shall be based shall be the sum of all charges for such services included in the bill.

Unlike the Federal communications tax, which is imposed on the person paying for the service, the State and local taxes under consideration are imposed on the companies engaged in the business of providing the service. Since these taxes are directly attributable to the telephone

services provided; they constitute an element of the cost of providing the services along with the costs attributable to labor and equipment. The fact that amounts attributable to such taxes are passed on and are separately stated on bills sent to customers does not change the legal incidence of the taxes. Therefore, the practical effect of separately stating amounts attributable to State and local taxes on bills sent to customers is simply to identify an element of the total charges for the telephone services provided to such customers.

Accordingly, it is held that amounts attributable to the State and local taxes referred to above, which are imposed on telephone companies but are passed on to customers and separately stated on customers' bills, may not be excluded in determining the amount upon which the Federal communications tax is imposed by section 4251(a)(1) of the Code.

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Nos. 71-777 and 71-807

In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT E. CLEVELAND AND FRANCIS H. CLEVELAND, PETITIONERS

v.

ILLINOIS BELL TELEPHONE COMPANY, AN ILLINOIS CORPORATION, AND UNITED STATES OF AMERICA

ROBERT C. AGRON, PETITIONER

v.

ILLINOIS BELL TELEPHONE COMPANY AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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SCOTT P. CRAMPTON,
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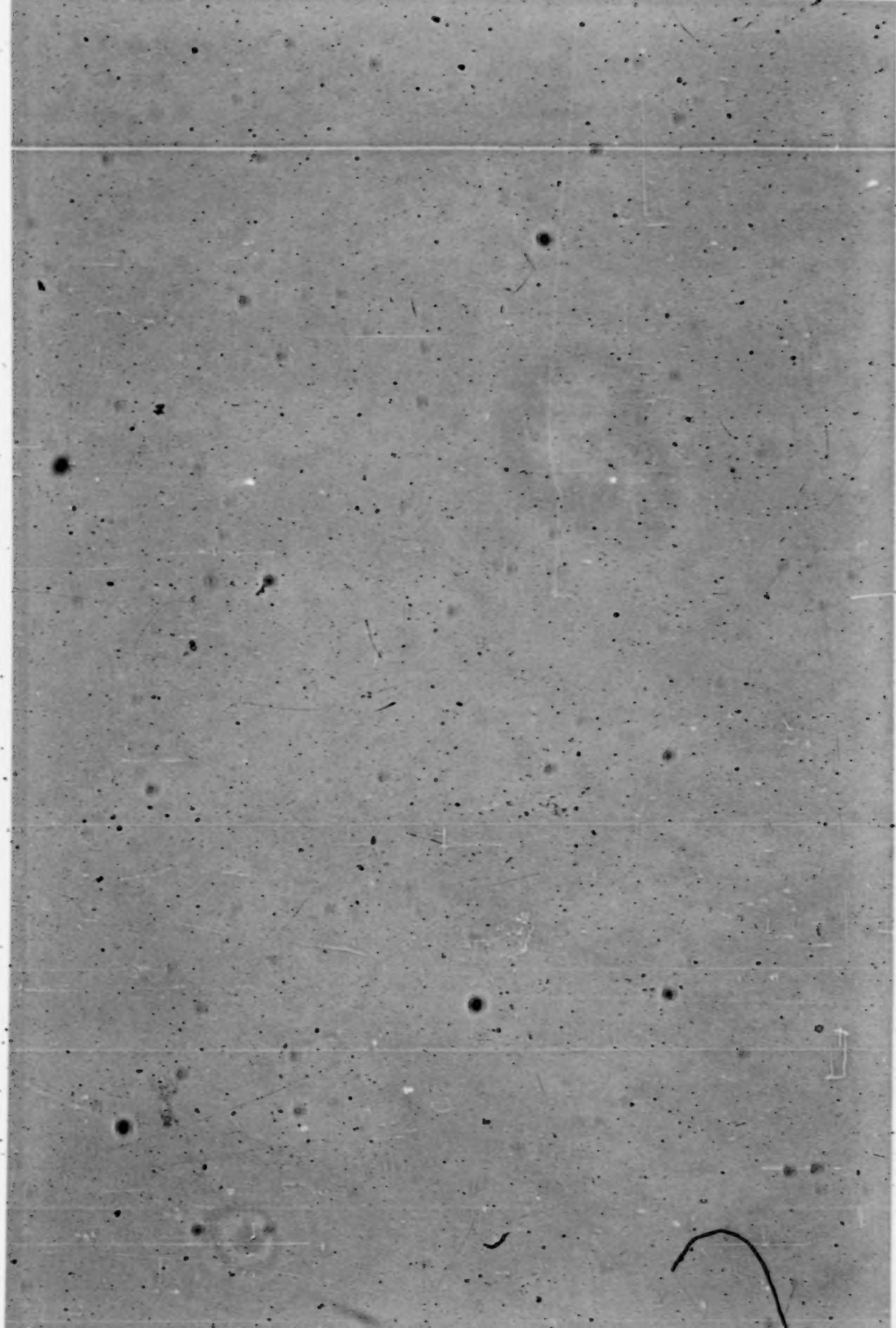

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-777

ROBERT E. CLEVELAND AND FRANCES H. CLEVELAND, PETITIONERS

v.

ILLINOIS BELL TELEPHONE COMPANY, AN ILLINOIS CORPORATION, AND UNITED STATES OF AMERICA

No. 71-807

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ILLINOIS BELL TELEPHONE COMPANY, AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion and order of the district court in No. 71-777 (Pet. App. 24a-29a) are unreported. The two opinions of the district court in No. 71-807 (Pet. App. 18a-26a) are reported at 319 F. Supp. 418 and 325 F.

Supp. 487. The opinion of the court of appeals in both cases (No. 71–777, Pet. App. 1a–15a; No. 71–807, Pet. App. 1a–17a) is reported at 449 F. 2d 906.

JURISDICTION

The judgments of the court of appeals were entered on September 22, 1971. The petitions for writs of certiorari were filed on December 11, 1971, in No. 71–777, and on December 18, 1971, in No. 71–807. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners may exclude from the base upon which the 10 percent federal tax on "amounts paid for * * * communication services", imposed by Section 4251 of the Internal Revenue Code of 1954, is computed, any part of the telephone rates authorized by Illinois law and charged and collected by Illinois Bell Telephone Company because those rates reflected operating costs including, among other items, increased state and municipal taxes imposed upon and collected from the telephone company.

2. Whether petitioners may maintain class actions for refunds of unstated amounts of federal taxes to unnamed and unidentified taxpayers who have not filed the claims for refund required by Section 7422(a) of the Internal Revenue Code as a prerequisite to the maintenance of a suit for the recovery of any internal revenue tax.

STATUTES INVOLVED

Sections 4251(a), 4252 (a) and (b), and 4254 (a) and (b) of the Internal Revenue Code of 1954 are set forth

in the Appendix to the petition in No. 71–807 (pp. 27a–28a). Pertinent sections of the Illinois statutes are set forth in the Appendix to the brief in opposition of respondent Illinois Bell Telephone Company (pp. A1–A6). Sections 6402(a) and 7422(a) of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, p. 13.

STATEMENT

Petitioners are residents of Chicago, Illinois, and are subscribers to telephone services supplied there by Illinois Bell Telephone Company ("Illinois Bell"), a public utility whose intrastate rates are regulated by Illinois law and the Illinois Commerce Commission. As telephone subscribers, petitioners are and have been subject to the tax at the rate of 10 percent imposed on "amounts paid for * * * communication services" by Section 4251 of the Internal Revenue Code. As provided therein, the tax is to be "paid by the person paying for the services", but, as required by Section 4291, it is collected by Illinois Bell, and remitted to the United States.

For over thirty years, the State of Illinois has imposed upon persons engaged in various businesses, including public utilities, a number of "occupation taxes." One of these has been a tax "upon persons engaged in the business of transmitting messages," measured by "gross receipts from such business." Smith-Hurd Ill. Ann. Stat., c. 120, §§ 467.1, 467.2. In 1955,[1] the State authorized municipalities to tax (at rates not to exceed 5 percent of gross receipts

[1] 1955 Laws of Illinois, p. 1900. Approved July 14, 1955.

from intrastate service in the taxing municipality) the occupations of various public utilities, including that of "[p]ersons engaged in the business of transmitting messages by means of electricity * * *." Smith-Hurd Ill. Ann. Stat., c. 24, § 8–11–2. Since that time, over seventy Illinois municipalities, including the City of Chicago, have imposed occupation taxes at rates up to 5 percent upon Illinois Bell. At the same session, the Legislature, by statute approved the same day,[2] amended the basic utility regulatory statute (Smith-Hurd Ill. Ann. Stat., c. 111 2/3) by adding what is now § 36(a), authorizing a utility subjected to the municipal occupation taxes to charge its customers for intrastate service in the taxing municipality, in addition to any rate otherwise authorized, an additional charge equal to (1) the amount of the municipal tax, or any part thereof, (2) 3 percent thereof to cover accounting costs, and (3) an amount equal to the increase in taxes and other payments to governmental bodies resulting from the additional charge. Such an increase in rates was to be made as others were—by filing a supplemental schedule specifying the additional charge with the Illinois Commerce Commission. The additional charge was to be shown separately on the utility bill to customers. The Commerce Commission could investigate to determine whether the additional charge was within the statutory formula, and could order refunds if it was excessive, but otherwise could not suspend this statutorily authorized increase, as it could with other revised rate schedules proposing increases.

[2] 1955 Laws of Illinois, p. 2022. Approved July 14, 1955.

When municipalities have imposed the occupation tax measured by gross receipts from service within the municipality, Illinois Bell has usually filed supplemental schedules of rates pursuant to the authority of § 36(a) and has billed its customers within the municipality accordingly.

In 1965, the Legislature of Illinois increased the rate of the state occupation tax upon "persons engaged in the business of transmitting messages" from 3 percent to 4 percent [3] (and in 1967 to 5 percent), and at the same time further amended the utility regulatory statute by adding § 36(b),[4] which performed substantially the same function in authorizing an additional charge with respect to the increase in the rate of the state tax that § 36(a) had performed with respect to newly imposed municipal occupation taxes. Illinois Bell has paid the state tax at the increased rates, has filed with the Commerce Commission appropriate supplemental schedules, and has made and collected the additional charge authorized. Section 36(b) did not require that the additional charge authorized thereunder be separately indicated on bills to customers, as § 36(a) did. It appears, however, that Illinois Bell has shown the additional charge separately on bills.

Illinois Bell, in accordance with rulings issued by the Commissioner of Internal Revenue, has collected and remitted to the United States the federal tax imposed by Section 4251 of the Internal Revenue Code

[3] 1965 Laws of Illinois, p. 1684. Approved July 16, 1965.
[4] 1965 Laws of Illinois, p. 1679. Approved July 16, 1965.

455-852—72——2

upon "amounts paid for * * * communication services" by computing it upon "the sum of all charges for such services included in the bill," as required by Section 4254, including the additional charges authorized by § 36 (a) and (b) of the Illinois statute.

Petitioner Agron filed a claim for refund of the communication tax in the amount of $23.98, asserting that, for a period beginning in 1965 and through the first three quarters of 1968, the tax he had paid had been improperly computed by virtue of including in its base the additional charges billed by Illinois Bell. At the same time, petitioner Agron filed a purported claim for refund of communication tax in an unstated amount, allegedly on behalf of unspecified and unnamed taxpayers ("all other telephone subscribers of Illinois Bell Telephone Company who are situated similarly to him"). Both claims were denied, and suit on three counts against the United States and Illinois Bell was thereafter instituted, asserting: in Count I, a claim for $23.98 on behalf of petitioner individually; in Count II, a class action on behalf of unnamed taxpayers who had not filed claims for refund; and, in Count III, a purported derivative action seeking refund to Illinois Bell of taxes collected by it from its customers, and by it paid over to the United States. Illinois Bell was thereafter voluntarily dismissed as a defendant under Count I by petitioner. On cross motions for summary judgment, the district court entered judgment for petitioner for $23.98 under Count I, but dismissed Counts II and III. On cross appeals, the court of appeals

reversed the judgment for petitioner on Count I, and dismissed petitioner's appeals on Counts II and III.

In No. 71–777, without having filed any claim for refund, the petitioners Cleveland instituted a similar individual and class suit against Illinois Bell alone in a state court in Illinois, demanding also declaratory and injunctive relief. The suit was removed to the United States District Court by Illinois Bell; and peitioners' motion to remand was denied. The United States was thereafter added as a defendant. On motions of the defendants, the suit was dismissed by the district court, and its order was affirmed by the court of appeals.

ARGUMENT

The decisions below are correct. There is no conflict of decisions or any other basis for review by this Court.

1. Petitioners contest the increase in the federal tax on amounts paid for communication services resulting from an increase in telephone rates authorized by Illinois law. Since the federal tax is 10 percent of the sum of all charges for such services, an increase in telephone rates inevitably results in an increase in the federal tax. Petitioners' claim is therefore groundless. It is no more significant that the rate increase was occasioned by an increase in municipal and state taxes imposed upon the telephone company than it would have been if the rate increase had been occasioned by increased costs of labor or materials. This Court has recognized that taxes imposed upon utilities are costs that must be included in the utilities'

rate structures and recovered by charges to their customers. *Federal Power Commission* v. *United Gas Pipe Line Co.*, 386 U.S. 237, 243; *Georgia Railway & Power Co.* v. *Railroad Commission*, 262 U.S. 625, 632–633; *Galveston Electric Co.* v. *Galveston*, 258 U.S. 388, 399.

In an effort to avoid the inevitable conclusion that the federal tax was properly increased as the telephone company's rates increased, petitioners assert that the Illinois municipal and state occupation taxes upon the telephone company were in fact taxes upon the customers of the telephone company, and for that reason improperly included in the base of the federal tax. This, of course, is entirely a matter of Illinois law, and hardly calls for review by this Court. In any event, the same argument has in a number of contexts been rejected by the Supreme Court of Illinois both as a matter of statutory construction and as a matter of constitutional imperative under the Illinois constitution. *Reif* v. *Barrett*, 355 Ill. 104, 188 N.E. 889; *People's Drug Shop, Inc.* v. *Moysey*, 384 Ill. 283, 51 N.E. 2d 144; *Vause & Striegel, Inc.* v. *McKibbin*, 379 Ill. 169, 39 N.E. 2d 1006; *International Business Machines Corp.* v. *Department of Revenue*, 25 Ill. 2d 503, 185 N.E. 2d 257. And this Court similarly has held that the parallel Illinois occupation tax upon retailers, measured by gross receipts from sales to the United States, was not a tax upon the United States. *United States* v. *Department of Revenue*, 371 U.S. 21, affirming 202 F. Supp. 757 (N.D. Ill.).

Petitioners also stress that the additional charge (which was not the amount of the municipal and state

taxes, but a composite of factors) was separately stated on the telephone company's bills. But both the Illinois Supreme Court and this Court have held that the separate statement of a tax is of no significance in determining its incidence. See *Fischman & Sons, Inc.* v. *Department of Revenue*, 12 Ill. 2d 253, 146 N.E. 2d 54; *Alabama* v. *King & Boozer*, 314 U.S. 1; cf. *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411, 418. This Court, moreover, pointed out in *Lash's Products Co.* v. *United States*, 278 U. S. 175, 176, that:

> The phrase "passed the tax on" is inaccurate, as obviously the tax is laid and remains on the manufacturer * * *. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. * * *

These observations constitute an effective answer to petitioners' claim that Illinois law, as they read it, reduces the base upon which the federal tax should be computed.[5] The economic impact of a tax upon a pro-

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[5] Petitioners' arguments present but slight, if any, verbal variants upon arguments that have frequently, and unsuccessfully, been advanced in state courts where the base upon which a sales or gross receipts tax is computed has been enlarged because an earlier tax, often separately stated, upon a manufacturer or distributor has increased the price of the goods. The Illinois decisions are: *Martin Oil Service, Inc.* v. *Department of Revenue*, 273 N.E. 2d 823; *Fischman & Sons, Inc.* v. *Department of Revenue*, *supra*; *People* v. *Werner*, 364 Ill. 594, 5 N.E. 2d 238. Similar decisions in other states, frequently citing *Lash's Products Co.* v. *United States*, *supra*, are: *Pure Oil Co.* v. *State*, 244 Ala. 258, 12 So. 2d 861; *Merchants Cigar & Candy Co.* v. *Birmingham*, 245 Ala. 587, 18 So. 2d 137; *Cass* v. *Colorado Beverage Co.*, 122 Colo. 101, 220 P. 2d 867; *Consolidated Distributors, Inc.* v. *City of Atlanta*, 193 Ga. 853, 20

ducer of goods or services of course ultimately falls upon a consumer in the form of increased rates or charges; but petitioners' arguments require a finding, rejected both by the Illinois courts and by the court of appeals, that the legal incidence of the Illinois state and municipal taxes was upon consumers.

2. Since the court of appeals rejected petitioners' contentions on the merits, it found it unnecessary to review the district court's decisions (in No. 71-807) that a class or derivative action could not be maintained on behalf of taxpayers who had filed no claims for refund, and (in No. 71-777) that petitioners could not maintain either an individual or a class action to recover federal taxes without having filed any claim for refund. The decisions of the district court were correct.

S.E. 2d 421, certiorari denied, 317 U.S. 662; *Undercofler* v. *Capital Automobile Co.*, 111 Ga. App. 709, 143 S.E. 2d 206; *State* v. *Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E. 2d 244; *Sun Oil Co.* v. *Gross Income Tax Div.*, 238 Ind. 111, 149 N.E. 2d 115; *State ex rel. Byers-Prestholdt Motor Co.* v. *Minnesota Tax Comm.*, 178 Minn. 360, 227 N.W. 43; *Havens* v. *Attorney General*, 91 N. H. 115, 119, 14 A. 2d 636, 639; *Hoffman* v. *City of Syracuse*, 2 N.Y. 2d 484, 141 N.E. 2d 605; *F. & M. Schaefer Brewing Co.* v. *Gerosa*, 14 N.Y. 2d 25, 197 N.E. 2d 291; *Lekman* v. *Grantham*, 78 N.C. 115; *Gruen Watch Co.* v. *Evatt*, 143 Ohio St. 461, 55 N.E. 2d 794; *S. & L. Straus Beverage Corp.* v. *Commonwealth*, 185 Va. 1055, 41 S.E. 2d 76. State courts have reached other results only where the taxing statute by its terms eliminated the amount of the prior tax from the computation of the tax in question (*Dupler's Art Furs* v. *State Tax Comm.*, 108 Utah 513, 161 P. 2d 788), or where the court found that the two taxing statutes imposed simultaneous taxes on the same transaction. *Tax Review Bd.* v. *Esso Standard Div.*, 424 Pa. 355, 227 A. 2d 657. Cf. *Cunningham Drug Stores* v. *Vims*, 319 Mich. 467, 29 N.W. 2d 915, with *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908.

Section 7422(a) of the Internal Revenue Code, Appendix, *infra*, p. 13, provides that "no suit or proceeding shall be maintained in any court" to recover internal revenue taxes "until a claim for refund * * * has been duly filed * * * according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof." This Court has regularly held that the statute, as its terms indicate, makes a proper claim a pre-condition to suit, and is not to be circumvented or rendered ineffective. *Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293; *United States* v. *Garbutt Oil Co.*, 302 U.S. 528; *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269; *Collector* v. *Hubbard*, 12 Wall. 1. Treasury Regulations on Procedure and Administration, § 301.6402–2(a)(1) and (c) require that the claim be "by the taxpayer", and in (e) permit a claim executed by an agent only if accompanied by a power of attorney. As this Court pointed out in *United States* v. *Andrews*, 302 U.S. 517, the claim is required not only in order to state the merits of the matter—the Commissioner had independently given a ruling favorable to the taxpayers in that case—but also to permit audit to determine whether other taxes or debts are owing to the United States so that they may be set off as required by Section 6402 of the Internal Revenue Code, Appendix, *infra*, p. 13, and by this Court's decision in *Cherry Cotton Mills, Inc.* v. *United States*, 327 U.S. 536. An unauthorized and indefinite claim, purportedly on behalf of unnamed taxpayers for unstated amounts, therefore fulfills neither the terms nor the purposes of the statute and regula-

tions. And the filing of the simple claim for refund (Form 843) by individual taxpayers would involve certainly no more, and probably less, effort and difficulty than proving their individual entitlement in a district court in a class action. The Internal Revenue Service routinely makes thousands of refunds every year.

Rule 82 of the Federal Rules of Civil Procedure provides that the Rules do not enlarge the jurisdiction of the district courts, and this Court has held that Rule 23 with respect to class actions does not enlarge that jurisdiction. *Snyder* v. *Harris*, 394 U.S. 332. Two district courts that have considered the question have held that class actions may not be maintained to recover internal revenue taxes on behalf of taxpayers who have not filed claims for refund. *McConnell* v. *United States*, 295 F. Supp. 605 (E.D. Tenn.); *Harkins* v. *United States*, 66–2 U.S.T.C. par. 9543 (E.D. Okla.), affirmed on other issues, 375 F. 2d 239 (C.A. 10). There is no authority to the contrary.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1972.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6402. AUTHORITY TO MAKE CREDITS OR REFUNDS.

(a) *General Rule.*—In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.

* * * * *

SEC. 7422. CIVIL ACTIONS FOR REFUNDS.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

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U.S. GOVERNMENT PRINTING OFFICE: 1972

Supreme Court, U.S.
FILED
FEB 9 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-807

ROBERT C. AGRON,

Petitioner.

vs.

ILLINOIS BELL TELEPHONE COMPANY, ET AL.,

Respondents.

REPLY TO BRIEFS IN OPPOSITION OF ILLINOIS BELL TELEPHONE COMPANY AND UNITED STATES OF AMERICA.

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February 8, 1972.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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ARGUMENT.

This Reply answers the Briefs in Opposition of Illinois Bell Telephone Company ("IBT") and of the Government ("U. S.").[1]

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1. Respondents' filing of single Briefs in Opposition to the separate *Agron* and *Cleveland* petitions may have merit to the extent it conserves the time of this Court and the parties' expenses, but it is an imposition on this Court to suggest, as IBT does (Br. 2, n. 1), that the issues "are essentially similar." *Cleveland* involves a simple jurisdictional issue—whether a refund suit can be maintained without filing any refund claim—a question about which there is no conflict or doubt as to resolution.

1. Both IBT[2] and the Government suggest that this case involves only a controlling issue of state law, namely, whether the state and local taxes are imposed on IBT or subscribers (IBT 4-5, 7, 9; U. S. 7-8). But the paramount issue here is one of federal law: are the state and local taxes themselves "amounts paid for communication services" under IRC § 4251.[3] There is no basis for concluding, as IBT does (IBT 7) that what are communication services is to be determined by state law. That issue must be determined by federal law "so as to give a uniform application to a nationwide scheme of taxation." *Lyeth* v. *Hoey*, 305 U. S. 188 (1938). Respondents, as did the court below, stake their position on a state law issue which becomes totally irrelevant in the light of the federal statutes, regulations and rulings (set forth at Pet. 6-7, 10-12) which make clear that the state taxes, especially where separately stated, are not amounts paid for communication services.

For the same reasons, even if, *arguendo*, as a matter of state law the legal incidence of the state and local taxes on

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Respondents' lumping the cases together is a transparent effort to dilute the substantial issues presented in *Agron* which should be decided by this Court. A denial of certiorari in *Cleveland*, however, will not prejudice petitioners there since they are fully protected in the class represented by Agron.

2. Even though not a party to the decision on the merits (Count I), IBT argues the merits (IBT 2-10) as well as the procedural issues (IBT 10-16). This is but another instance of this public utility's working against the interests of its subscribers. IBT's claim (IBT 8, n. 4) that it must blindly follow the Government's dictates is not true. See IRC § 6415.

3. Nor did Agron "first contend," as the Court of Appeals said (Pet. 6a), that the local taxes are imposed directly on subscribers. It is respondents who have always contended that under state law the taxes are imposed on IBT and from that premise argued they are part of IBT's rates for telephone service. Petitioner has always asserted, *first*, that whether the legal incidence of the state and local taxes is on IBT or subscribers the taxes are not, as a matter of federal law, amounts paid for communication services, and second, under state law, the taxes are imposed on the subscribers and are not charges or rates for telephone service.

telephone service is on IBT rather than subscribers, it does not follow that such taxes are, as a matter of federal law, amounts paid for communication services. Respondents, as did the court below, erroneously assume that the determination of the legal incidence question under state law is the end of the matter. While it may be, in the context of various state law and constitutional principles, that the legal incidence falls on IBT, the federal courts need not blindly follow that law in determining whether such taxes are charges or amounts paid for communication services under the federal statutes, regulations and rulings set forth in the Petition. This is especially true where, as here, the Illinois Supreme Court has expressly held that the state taxes here involved are in substance imposed on the subscribers, not the utility. *East St. Louis* v. *Union Electric Co.*, 37 Ill. 2d 532, 229 N. E. 2d 522, *cert. denied*, 390 U. S. 948 (1967).

2. Even under state law, the state and local taxes are not charges or rates for telephone service.

(a) Contrary to respondents' assertions (IBT 6, 8, 9; U. S. 2, 7), the taxes separately billed to subscribers are not part of IBT's "expenses" for purposes of rate making. Only the first or original 3% of the State Message Tax (which is not billed to subscribers as a separate tax) is included by IBT and the Illinois Commerce Commission ("ICC") in determining "reasonable rates" for telephone services (Phelps' Affidavit ¶ 4, Jt. App. 44). (It is because this original portion of the State Message Tax is included in IBT's rates through the rate-making process that petitioner made no claim regarding such taxes. See Pet. 14a, n. 14.) Respondents' argument and the conclusion of the court below that the state and local taxes here involved are, like all other taxes and expenses, included by IBT and the ICC in determining fair telephone rates is simply not based in fact or law.

(b) Under § 35 of the Public Utility Act, Ill. Rev. Stat. (1971) ch. 111⅔, § 35, IBT is required to file rates for service *before* rendering service. Since IBT *may* but need not file schedules with respect to the state and local taxes under § 36(a) and (b), the § 36(a) and (b) taxes are not for telephone "service" within the meaning of § 10.15 of the Public Utility Act.

(c) There is no legislative history to support IBT's argument (IBT 6) that §§ 36(a) and (b) were enacted simply to provide for a speedy and economical substitute for rate-making. Rather, it is more likely that the intent was to permit the collection of taxes from the consumer, with the utility as the conduit, in order to meet state constitutional limitations as hinted at by the Court of Appeals (Pet. 9a, n. 11).

(d) The filing of supplemental schedules under §§ 36(a) (b) does not transform the taxes into rates for telephone service. The ICC is specifically denied rate-making power under §§ 36(a)(b) with respect to the state and local taxes, and is given the power only to determine whether the utility is collecting the correct amount of taxes plus the costs of collection.

3. To prop up the decision below IBT strongly relies on the 1969 tax ruling promulgated *pendente lite* and urges that it is not *ex post facto* because it merely "reaffirmed" an unpublished 1948 IRS letter ruling (IBT 2, 8, n. 4, 10, A7-A12).[4] The 1969 ruling is crucial to respondents' case because, contrary to IBT's assertion (IBT 8, n. 4), it was

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4. As noted, the court below also relied on the 1969 ruling *sub silencio* (Pet. 10, n. 3). Throughout its opinion the court speaks in terms of amounts "attributable" to taxes (Pet. 2a, 4a, 6a, 14a, 15a) just as does the 1969 ruling (IBT A11-A12). However, for many years the telephone bills upon which IBT has collected amounts for taxes as separate items state that such items are "due to," not "attributable" to taxes (Pet. 2a, n. 2).

the first time the Government took the position that the separate statement of taxes has no tax consequences to a vendee if *(arguendo)* the taxes are imposed on the vendor. On its face the 1948 ruling does not purport to deal with a situation where the taxes were stated separately (IBT A7-A9).[5] Significantly, the Government does not specifically cite or argue either ruling. Certainly this Court must be struck by the Government's glaring omission as to the 1969 ruling which purports to deal with the very state and federal taxes here involved. The Government offers no answer to the petitioner's contention (Pet. 8-12) that the separate statement of taxes does have different federal tax consequences which here requires the exclusion of the state and local taxes from the federal tax base.

In sum, respondents do not confront the contradiction between the decision below and the cases cited at Pet. 8-10, including one facet of this Court's holding in *Lash's Products*, that under federal law the price of goods or services does not include separately stated taxes whether the taxes are imposed on vendor or vendee. Likewise, respondents make no effort to deal with the federal statutes and the Government's own long-standing rulings (Pet. 10-12) which make clear that the separately stated local taxes—even if legally imposed on IBT—must be excluded from the federal tax base. These important issues remain in this case

5. Moreover, the 1948 ruling concerned certain taxes in the State of Washington the nature and imposition of which differed markedly from those of Illinois and, therefore, the 1948 ruling has no application here. See, *State ex rel. Pacific T. & T. Co.* v. *Department of Public Service*, 19 Wash. 2d 200, 142 P. 2d 498 (1943). It does not appear that the Washington passed-through taxes were stated separately on bills to subscribers or whether they were merely included in the general rates charged to subscribers. As to the invalidity of the 1948 ruling, we note that while the IRS concluded the local Washington taxes were includable on the ground that they "are considered proper items of operation expenses," the Washington Supreme Court held that the license taxes could be passed through to particular subscribers because they were *not* general operating expenses.

whether or not respondents face up to them. It is important that this Court resolve these issues and reverse the decision below so that millions of taxpayers—whose respect for the rule of law is so important to our system of voluntary tax payments—may be confirmed in their belief that neither Congress nor the courts have mandated a tax on a tax.[6]

4. With respect to the procedural issues, respondents suggest that judicial relief is unnecessary because there is an administrative body (IRS) that will "ensure repayment" (IBT 13; U. S. 12). But this "administrative" "remedy" will only ensure non-payment. The three million telephone subscribers can obtain refunds as a practical matter only by a class action (Pet. 13-15). Moreover, we stress that the relief sought here is that the United States make one refund to IBT in the total amount due to the class, an amount which can be readily and precisely determined by IBT, and that thereafter IBT make refunds to subscribers in a manner that will do substantial, if not precise, justice to them (Pet. 3-4, footnote*, and 17-18, n. 13). IBT is accustomed to making small refunds. Kalven and Rosenfield, "The Contemporary Function of the Class Suit", 8 U. of Chi. L. Rev. 684, 685-6, n. 5 (1941).

The cases cited by respondents (IBT 11; U. S. 12) are distinguishable. *Harkins* and *McConnell* concerned income tax refunds. In *Harkins* the court held it lacked jurisdiction

6. IBT suggests the issues may be moot after a 1973-1982 graduated tax repeal (IBT 7, n. 3). But repeal by 1982 obviously has no effect on the past; present and continuing refunds of 3,000,000 subscribers whose claims exceeded $10,000,000 as of 1969. Further, Congress passed (and later postponed) a similar repeal in 1965 (P. L. 89-44) because it expressly recognized the "regressive" character of the federal tax (1966 CCH Excise Tax Service, ¶ 2250, p. 1618). The fact that Congress would like to repeal this regressive tax someday hardly supports its past or continuing overcollection.

because the suit was untimely filed. In *McConnell* it does not appear that a class refund claim was filed or that there was such a substantial number of small claimants that it would be impractical to file individual claims. (Respondents do not cite *Lipsett* v. *United States*, 37 F. R. D. 549 (SDNY 1965), aff'd, 359 F. 2d 956 (CA 2, 1966), relied on by the district court (Pet. 24a), which implied that a class action would lie in a proper case.)

The Government also urges that a class refund does not satisfy the Treasury Regulations (U. S. 11). It does. The cases cited by the Government are fully answered by those cited at Pet. 17-18, n. 13 and *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71 (1933). The weakness of the Government's case may be measured by its argument that it will be denied an "audit to determine whether other taxes or debts are owing to the United States." An audit of what?—subscribers do not file excise tax returns. If the Government has the right and desire to consider millions of income tax returns of subscribers to offset taxes or indebtedness against small telephone tax refunds, there is no bar to its doing so, even though it anticipates audits no more than it does refund claims. See Pet. 15. In any event the lower court has not yet considered the mechanics of the refunds.

Nowhere do respondents meet the argument (Pet. 16-19) that the filing of the individual and class refund claims fully satisfy the jurisdictional requirements of IRC § 7422(a).

Conclusion.

Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Court of Appeals for the Seventh Circuit, reverse the judgment of that court and grant such other relief as may be appropriate.

Respectfully submitted,

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February 8, 1972.